Neutral Citation Number: [2023] EAT 132

Case No: EA-2021-000595-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 November 2023

Before :

JUDGE STOUT

- -

Between :

Mr R Omar

Appellant

- and –

Epping Forest District Citizens Advice

Respondent

- -
- -

Mr S Harding (instructed on direct access) for the Appellant
Mr P Wilson (instructed by Irwin Mitchell LLP) for the Respondent

Hearing date: 5 September 2023

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant resigned from his employment with the respondent 'in the heat of the moment' during an altercation with his line manager. In a subsequent conversation, it had apparently been recognised by his employer that he wished to continue in employment, but his line manager decided she no longer wanted to work with him and he was asked to confirm his resignation in writing, which he said he would do, but did not and instead sought formally to retract his resignation. The claimant's case was that in law he had not resigned as the situation fell within the so-called "special circumstances exception" recognised in **Sothern v Frank Charlesly** [1981] IRLR 278. He argued that he had been unfairly and wrongfully dismissed. The respondent argued that he had resigned. The Tribunal found in favour of the respondent.

Held, allowing the appeal and remitting the case for a fresh hearing: -

The Tribunal had erred in law by failing to make adequate findings of fact and failing to direct itself properly in accordance with the applicable legal principles, which the EAT has decided after a full review of the earlier case law are as set out [97] of the judgment and are in summary as follows:-

a. There is no such thing as the 'special circumstances exception'; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context.

b. A notice of resignation or dismissal once given cannot unilaterally be retracted. The giver of the notice cannot change their mind unless the other party agrees.

c. Words of dismissal or resignation, or words that potentially constitute words of dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. The subjective uncommunicated intention of the speaking party are not relevant; the subjective understanding of the recipient is relevant

but not determinative.

d. What must be apparent to the reasonable bystander in the position of the recipient of the words is that:

    i. the speaker used words that constitute words of immediate dismissal or resignation (if the dismissal or resignation is 'summary') or immediate notice of dismissal or resignation (if the dismissal or resignation is 'on notice') – it is not sufficient if the party merely expresses an intention to dismiss or resign in future; and,

    ii. the dismissal or resignation was 'seriously meant', or 'really intended' or 'conscious and rational'. The alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign/dismiss and also to be 'in their right mind' when doing so.

e. In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were 'really intended' and the analysis will stop there. A Tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were 'really intended' unless one of the parties has expressly raised a case to that effect to the Tribunal or the circumstances of the case are such that fairness requires the Tribunal to raise the issue of its own motion.

f. The point in time at which the objective assessment must be carried out is the time at which the words are uttered. The question is whether the words reasonably appear to have been 'really intended' at the time they are said.

g. However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended' at the time.

h. The difference between a case where resignation/dismissal was not 'really intended' at the time and one where there has been an impermissible change of mind is likely to be a fine one. It is a question of fact for the Tribunal in each case which side of the line the case falls.

i. The same rules apply to written words of resignation / dismissal as to spoken words.

JUDGE STOUT:

Introduction

1. This was a hearing heard wholly remotely by video using MS teams. The claimant is the appellant, but I will refer to the parties as they were in the proceedings below.

2. The claimant was employed by the respondent legal advice centre from 22 February 2016 to 18 March 2020 as an Advice Session Supervisor. There was a dispute between the parties about the circumstances in which the claimant's employment came to an end, and he brought claims to the tribunal of unfair dismissal, alternatively constructive unfair dismissal, and wrongful dismissal.

3. The claimant appeals from the judgment of the East London Employment Tribunal (Employment Judge Peter Wilkinson, sitting alone) ("the Tribunal") given orally at what was a 1-day hearing on 27 January 2021 and sent to the parties on 2 February 2021, with written reasons following on 15 March 2021. The Tribunal dismissed all of the claimant's claims. The claimant appealed to the Employment Appeal Tribunal (EAT) by notice of appeal dated 24 January 2022. Permission to appeal was refused by HHJ Shanks on the papers. Following a hearing under rule 3(10) of the EAT Rules on 8 December 2021, at which the claimant was represented by Stuart Brittenden under the ELAAS scheme, HHJ Auerbach granted the claimant permission to appeal on two grounds.

The grounds of appeal

4. The grounds of appeal as articulated following the Rule 3(10) hearing are that the Tribunal erred in law in the application of the "special circumstances" exception in the cases of **Sothern v Frank Charlesly** [1981] IRLR 278 ("**Sothern**"), **Kwik-Fit (GB) Ltd v Lineham** [1992] IRLR 156 ("**Kwik-Fit**") and **Willoughby v CF Capital PLC** [2011] EWCA Civ 1115, [2012] ICR 1038 ("**Willoughby**"), in particular:

(1) The tribunal made scant factual findings as to the circumstances surrounding the appellant's communication of his resignation on 19 February 2020. It was necessary for the tribunal to make such findings in order to determine whether or not resignation was in fact tendered in the heat of the moment, or in a period of "emotional stress" (**Sothern**);

(2) Further, it was necessary for the tribunal to make sufficient factual findings as to the meeting on 19 February 2020 between the appellant, Ms Skinner and Miss Anyanwu. The tribunal made no adequate findings / provided inadequate reasons as to what was agreed upon at the culmination of that meeting (the tribunal erred in focusing exclusively on whether the appellant was offered an alternative position, in circumstances where there was reconciliation at the meeting).

Background

5. The factual findings contained in the judgment in this case are relatively limited. Mr Wilson for the respondent submits that they did not need to be more detailed. Mr Harding for the claimant disagrees. I deal in my discussion and conclusions below with the merits of their respective positions. In order to make sense of the appeal, however, I need here to set out the more detailed factual background on which Mr Harding relies, as it appears from the documents before me. In so doing, I acknowledge, and emphasise, that the documents before me do not represent the totality of the evidence that was before the Tribunal. As well as more documents, the Tribunal also had witness statements for six witnesses and heard oral evidence. I am mindful therefore in setting out these facts that I do not have the full picture and I bear that in mind when addressing the merits of the appeal below.

6. The parties' factual cases, as they appear from their pleadings (ET1 and ET3) and other documents before me are, in summary as follows:-

(1) The claimant's line manager at the time of the termination of his employment was Ms Skinner.

(2) The respondent's pleaded case, set out at paragraphs 4 and 5 of the ET3 was that on 3 February 2020 the claimant was sent a letter by the respondent's Chief Executive Officer, Ms Anyanwu, about his timekeeping. The claimant told Ms Skinner that he was unhappy about the letter and verbally resigned. Ms Skinner advised the claimant to calm down and that she would not accept his resignation at this stage. On 5 February 2020 the claimant became angry again about something else and resigned again, giving a month's notice. Again, Ms Skinner advised him to calm down and that she would not accept his resignation.

(3) On the morning of 19 February 2020, the parties agree, the claimant became angry again on being asked by Ms Skinner about his holiday dates, swore at Ms Skinner and used words of resignation. The respondent's pleaded case was that the words were *"these are fucking bullshit … that's it, from today a month's notice"* and that this verbal resignation had been accepted by Ms Skinner. The Claimant's pleaded case (paragraph 2) was that he *"responded badly"* to a query from Ms Skinner about what he believed was booked annual leave not showing on the staff leave database *"by shouting, 'you know full well that I have leave booked as everyone that needs to know has been informed' and that I was 'done with the organisation' and 'tell who you need to but I'm off because I'd had enough'"*. Notes of an internal grievance investigation with the claimant (p 75) indicates that he accepts he also swore at Ms Skinner broadly as alleged by the respondent.

(4) The claimant's pleaded case (ET1, paragraph 3) was that: *"Later that afternoon the CEO [Ms Anyanwu] came to the office and had a meeting with me and [Ms Skinner]. The first question put to the both of us was "what was going on with you two". I explained my reason for "blowing up", including that the previous week on or around 12 February 2020 I came into work and read an email address to me warning me about my timekeeping."* He added: *"I have been working under considerable pressure for some time as I was also helping my father care for my mother who has dementia. This was with the full knowledge of Ms Skinner"*. He went on at paragraph 5, *"I mentioned something which compounded my reaction that towards the end of 2019 my father was hospitalised and it would have been the first time that I started to care for my mother stop"*. At paragraph 6, he said that he told the CEO at the meeting on 19 February 2020 that he felt he was being treated unfairly regarding time off for these matters in comparison to a colleague who had suffered a bereavement. He pleaded that the meeting ended with Ms Anyanwu, *"looking at both me and [Ms Skinner and asking] whether we could continue working together and we agreed that we could 'as these fallouts happen'"*. He also alleged at paragraph 7 that the CEO had at this meeting offered him an alternative role and given him a chance to think about it.

(5) The respondent's pleaded case about the meeting on the afternoon of 19 February 2020 was (at paragraphs 7 and 8 of the ET3) that the purpose of the meeting was *"to ensure that the claimant did not leave his employment on bad terms"*, and that at the end of the meeting *"Ms Anyanwu requested both the claimant and Ms Skinner go away and think about what has happened and how they could work together over the claimant's notice period with regards to the changes that had taken place"*. The respondent pleaded that, *"the claimant did not attempt to withdraw his resignation at*

this meeting". The respondent denied having offered the claimant an alternative role, but accepted that Ms Anyanwu had mentioned that the respondent was looking at supervisors working differently going forward. Notes of the internal investigation meeting with Ms Anyanwu (page 78) indicate that she recognised the claimant as being emotional at the meeting.

(6) The claimant works every other day and his next day of work was 21 February 2020. His pleaded case was that he went to see Ms Anyanwu who said *"before you say anything [Ms Skinner] has decided that she cannot work with you and therefore your resignation will stand"*. The respondent's pleaded case at paragraph 9 suggests that it is agreed this is how the meeting started, but continues, *"The claimant accepted this and told Ms Anyanwu that he could not work with Ms Skinner and that therefore his resignation still stood"*.

(7) Although it is not in his pleaded case, I understand it to be accepted by the claimant that he did at the meeting on 21 February agree at Ms Anyanwu's request to put his resignation in writing.

(8) However, the claimant did not do that, but on 23 February 2020 (his next working day) emailed Ms Anyanwu in terms that included the following: *"my understanding is that as a result of my behaviour [Ms Skinner] now wants to accept my resignation as she will be unable/unwilling to work with me going forward, which I understand. However, I wish to retract my resignation as it was a "heat of the moment" resignation resulting from unresolved grievances I had and hope my experience is recognised as being equally valid. Moreover, my interpretation of the meeting that we had on Wednesday was that I was to consider a change of job role … I think that you might agree that at the time this showed some willing on everyone's*

part to move the problem forward. Whilst I declined the position the principle of reconciling I believe remained, so might I suggest that if [Ms Skinner] will find it difficult to work with me that I be allocated to another office? I would be happy to work across the other bureaux as required. Alternatively, perhaps you could initiate the disciplinary procedure against me and review it after six months or so?"

(9) The respondent refused to accept the retraction of his resignation and treated his employment as terminating on one month's notice running from 19 February, i.e. on 18 March 2020. The claimant worked out his notice period, while pursuing an internal grievance about what had happened (which was not upheld).

The Tribunal's decision

7. The Tribunal's written reasons run to just seven pages.

8. The Tribunal at paragraphs 7 to 13 records the following salient matters by way of background facts:-

(1) At paragraph 8, that it was agreed that on 19 February 2020 the claimant and his line manager were involved in *"an altercation"*, that the claimant during that altercation *"said words intended to convey his intention to resign"* and *"that the words were so understood by Ms Skinner"*. The tribunal stated: *"there is a dispute as to precisely what those words are, which is not relevant to the determination of the claims"*;

(2) At paragraph 9, that it was agreed that there had been other altercations between the claimant and Ms Skinner prior to 19 February 2020 and that on at least one of those occasions the claimant had said he was resigning but was invited to and did reconsider;

(3) At paragraph 10, that later on 19 February 2020, a meeting took place between the claimant, Ms Skinner and Ms Anyanwu, and that it was the claimant's case *"that at this meeting he was offered an alternative position by [the respondent] and was asked to think about it"*, but that this was disputed by the respondent whose case was *"no such offer was made although possible future changes within the organisation were discussed"*. The Tribunal recorded that it was the claimant's case that he had refused the offer he believed had been made;

(4) At paragraph 11, that there was a further meeting on 21 February 2020, at which it was agreed that the claimant was asked to put his resignation in writing and also common ground that he agreed to do so;

(5) At paragraph 12, that on 23 February 2020, the claimant had sent an email to Ms Anyanwu stating a desire to withdraw his resignation, on the basis that it had been tendered *"in the heat of the moment"*.

9. The tribunal went on at paragraph 14 to record the claimant's case as being as follows, so far as relevant:

(1) *"His resignation was in the heat of the moment and should not have be relied upon.*

(2) *He withdrew his resignation promptly.*

(3) *The respondent offered him another position on 19 February 2020.*

(4) *The respondent's communication to me that Ms Skinner had changed her mind and could not work with him amounted to a dismissal and that dismissal was unfair.*

(5) *Alternatively, the actions of the respondent prior to his resignation amounted to*

a repudiatory breach of contract, entitling him to consider himself dismissed."

10. The respondent's response was recorded at paragraph 15 as follows, again so far as relevant:

(1) *"The claimant resigned on 19 February 2020, using unequivocal words of resignation.*

(2) *Insofar as the claimant indicated a wish to withdraw his resignation, he did not do so promptly.*

(3) *The respondent did not offer him another position on 19 February 2020.*

(4) *The respondent's communication of Ms Skinner's change of mind in relation to working with the claimant could not amount to a dismissal in circumstances in which he had already resigned and in any event, such communication related to arrangements during his notice period.*

(5) *None of the actions of the respondent prior to the termination of the claimant's employment was capable of amounting, individually or collectively, to a repudiatory breach of the contract of employment".*

11. The Tribunal went on at paragraphs 16 to 21 to what it described as *"the principal issue of fact in contention"*, which it identified as being whether the claimant was offered a new role at the meeting on 19 February 2020. The tribunal concluded that he had not been offered another position, but that he had genuinely believed that he was being offered another position, which he declined. The tribunal further found at paragraph 20 that the claimant *"did not communicate any intention to withdraw his resignation, nor any equivocation about his resignation, before the email of 23 February 2020"*. Finally, the Tribunal at paragraph 21 recorded *"on the basis of the agreed evidence, I find that [the claimant] declined what he believed to be the offer of another post with [the*

respondent] on 19 February 2020 and that he had not, as at 21 February 2020 accepted any other position with the respondent before being informed that the respondent considered that he had resigned and that his resignation would be considered to take effect from 19 February 2020".

12. The tribunal made no other findings of fact. Save to the extent identified in the foregoing, the factual background and the parties pleaded cases as I have set them out above in the Background section did not appear in the judgment.

13. The Tribunal then proceeded to give itself legal directions.

14. At paragraph 22, the Tribunal set out section 95 of the **Employment Rights Act 1996 (ERA 1996)** which provides the statutory definition of dismissal for the purposes of Part X of the **ERA 1996**.

15. At paragraph 23, the Tribunal directed itself by reference to the authority of **Harris and Russell Ltd v Slingsby** [1973] ICR 454, NIRC, that a resignation operates to determine the employment relationship, that once unequivocally communicated a resignation brings the relationship of employment to an end, that a resignation does not need to be accepted in order to be effective and that once notice to terminate a contract of employment has been given, it cannot be withdrawn unilaterally, only by agreement between the parties.

16. At paragraph 24, the Tribunal directed itself by reference to the **Sothern** case and reached the following conclusion, which is the subject of the challenge on this appeal:

> **"24 …. I do not believe that there are circumstances here which take [the claimants]'s resignation out of the general rule and into the Sothern exception such that his resignation was not to be taken as valid. I reached this conclusion for the following reasons:**
>
> **24.1 the words used were unequivocal and clearly intended to amount to a resignation.**
>
> **24.2 [the claimant] is not an immature and inexperienced employee, he is an intelligent man**

with experience in the workplace.

24.3 there was no immediate retraction, despite [the claimant] having the opportunity to retract in meetings on the same day and on 21 February 2020.

24.5 [The claimant] expressly agreed to put his resignation in writing when he met Miss Anyanwu on 21 February 2020.

25. Given the above, I consider that [the claimant] brought the employment contract to an end by his resignation on 19 February 2020 and his plain words of resignation were effective to terminate his employment.

26. I have already found that no substantive offer of employment in a new position was made to him on 19 February 2020, but in the event that I am wrong about that, in any event, he is himself clear that he declined what he believed to be the offer of a new position. If the communication to him on 21 February 2020 that his resignation would stand amounted to a withdrawal of any such offer, it is clear that [the respondent was] entitled to withdraw any such offer given that it had not been accepted.

27. Accordingly, I find that [the claimant's] contract was terminated by him and not, as required by s 95(1) ERA 1996, by his employer and accordingly, there was no dismissal for the purposes of s 95(1)(a) ERA 1996."

17. The Tribunal went on at paragraphs 28 to 32 find that there was no constructive dismissal either, the claimant not having advanced his case on the basis that he had resigned in response to a repudiatory breach.

Submissions

18. Both parties produced Skeleton Arguments and made oral submissions. In setting out the parties' submissions I use the abbreviated forms of the case names that I have adopted in the Law section below.

The claimant's submissions

19. Mr Harding for the claimant began his oral submissions by addressing a question I had raised in advance of the hearing in the light of a point made in Mr Wilson's Skeleton Argument as to whether the claimant was to be taken to have conceded his case by agreeing (as recorded at [8] of the judgment) *"both that he intended the words to be understood as being his resignation and that the words were so understood by Ms Skinner"*. Mr Harding submitted that this did not amount to a concession of the claimant's case and it was not understood as such by the judge because the judge does not in the judgment regard it as determinative. He submitted that if it did amount to a concession, the judge would have had to have proceeded in accordance with the principles in **Paul v Virgin Care Limited** (UKEAT/0104/19/RN) (to which I had referred the parties) given that the claimant was a litigant in person.

20. As to the legal principles to be applied to the dispute in this case about whether the claimant had resigned or been dismissed, Mr Harding submitted that the relevant legal principles were well settled and that although an employer was normally entitled to rely on words of resignation in accordance with their plain and natural meaning, there were 'special circumstances' that could oust the application of the general rule. He referred to the judgments of the Court of Appeal in **Sothern**, **Sovereign House** and **Willoughby** and to the judgment of the EAT in **Kwik-fit**.

21. As to the extent to which the test to be applied was subjective or objective, Mr Harding referred to **Sothern** and submitted that Dame Elizabeth Lane at [25] had not adopted a wholly objective test, but had taken account of the claimant's subjective intention and also the employer's understanding. As to what Fox LJ said at [19], Mr Harding submitted that if the employer understood what was intended that was normally sufficient, but Fox LJ's *obiter* observations at [21] were an exception to that.

22. He emphasised that it was clear from **Sovereign House** that the fact that unambiguous words

of resignation were used, and were so understood by the employer, did not mean that the resignation was effective if there were special circumstances. He submitted that the authorities refer to the employee's intention, but as a matter of common sense they cannot mean that the matter is determined by whether the employee intended to resign in the moment that he or she said words of resignation, because the employee in the heat of the moment probably did intend to resign, but the question was whether, once all the circumstances were considered, the employee 'really' intended to resign. He referred to **Willoughby** at [27] as setting out the principles. He noted that the **Willoughby** case itself indicates that a mistake does not amount to special circumstances, and also that a different approach may be taken to heat of the moment actions by an employer and an employee (although *cf* the **Martin** case which takes the same approach to the employer as to employee).

23. Mr Harding referred to **Kwik-Fit** and highlighted the facts of the case at [12] and the principles at [31]. He accepted that what followed paragraph [31] indicated that Wood J had been under a misconception that a resignation is a repudiatory breach of contract, but that the question of the length of time during which an employee reflects and 'changes their mind' or retracts must be relevant to determining whether the employee truly intended to resign at the time.

24. As to **Denham**, Mr Harding submitted that the EAT's judgment in that case merely set out the orthodox situation in which there is normally no room for any notion of 'special circumstances'. He submitted that **Denham** was quite different to this case in which the claimant had resigned and been treated as not having resigned at least once previously.

25. Mr Harding took me through the factual basis of the claimant's case, the main elements of which I have sought to capture when setting out the Background to this matter above. He submitted that if, as appeared to be agreed, Ms Anyanwu on 19 February asked the claimant and Ms Skinner if they could work together, that was the employer was looking for a way to smooth matters over and indicated that it was understood that the claimant had not intended to resign. He also referred to the

emails in the bundle which show that as at 20 February Ms Anyanwu was unsure as to whether the claimant wished to resign, and that Ms Skinner had on reflection said that she could not work with him. There is also an email from Ms Wells of HR saying that she is *"not happy with him threatening his resignation and then taking it back"* which he submitted indicated that the employer did not regard the claimant as having resigned.

26. As to the meeting on 21 February, the claimant's position as pleaded was that the meeting had started with Ms Anyanwu saying *"before you say anything Jenny has decided that she cannot work with you and therefore your resignation will stand"*. It was in this context that the claimant said he was offered a new position to consider.

27. Mr Harding then turned to the judgment under appeal. He emphasised that the claimant was unrepresented before the Tribunal. He pointed out that the Tribunal has not in its findings of fact dealt with the words that were used or the context of the altercation on 19 February 2020, or with anything that was said on 19 February 2020 other than the question of whether the claimant was offered an alternative position at that meeting. Nor is there any mention of the claimant's evidence as to his personal circumstances. At paragraph 11, there is a record that it is agreed that the claimant was asked to put his resignation in writing and that he agreed to do so, but the rest of the conversation on 21 February 2020 is not dealt with at all, including in particular the claimant's case that the meeting had started with Ms Anyanwu saying that Ms Skinner had decided that she could not work with him.

28. He submitted that the Tribunal had clearly erred at paragraph 16 in identifying 'the principal issue of fact' as being whether the claimant was offered a new role at the meeting on 19 February 2020. That factual dispute was relatively unimportant, if not irrelevant to the legal issue. The principal issues were, he submitted, whether the special circumstances on which the claimant sought to rely had happened as he described. The tribunal had failed to focus on the claimant's and respondent's state of mind, understanding and intentions.

29. He submitted that the Tribunal at [24] had failed to address the evidence of the claimant's real intention, his state of mind or personal circumstances, the Tribunal just says that the claimant was not immature, that he was experienced and intelligent. Further, what the Tribunal says about there being no immediate retraction of the resignation fails to have regard to what actually happened at the meetings on 19 February and 21 February.

30. For all these reasons, Mr Harding submitted that the judge had not made adequate factual findings and had not considered the special circumstances properly in accordance with the authorities.

The respondent's submissions

31. Mr Wilson submitted that there has been an evolution of the law since the **Sothern** case, where the *obiter* comments are seized upon in subsequent cases up to the case of **Willoughby**. He submitted that **Willoughby** was the most thorough examination of the law to date. He submitted that, in the absence of special circumstances, a person is bound by their unambiguous words. He submitted that at [37]-[38] the Court of Appeal emphasises that the exception is not an opportunity for a unilateral retraction. The Court says that what needs to be considered is whether the employee's *"mind was not in tune with his words"*. In **Willoughby** the employer fully intended to dismiss, it was just mistaken as to the employee's wishes.

32. Mr Wilson submitted that the first question is always whether unambiguous words were spoken or not, and the next question is whether you intended to resign when speaking those words. He submitted that the claimant in this case 'fell at the first hurdle' because he did intend to resign when he said he did. He submitted that the special circumstances exception requires the employer to ask themselves whether the person did or did not really intend to resign. If the employee did intend to resign, that was the end of the matter.

33. He submitted that you could use heated words and fully intend to resign and you can use

heated words and not mean them and have no real intention of resigning. **Kwik-fit** was saying that you need to look at what happens afterwards and whether circumstances put you on notice that further enquiry is desirable. However, **Denham** reflects the orthodox position. There is a reference in that case to the employee having been depressed at the time of tendering her resignation (p 34), but that was not sufficient to displace the ordinary rule.

34. Mr Wilson submitted that the problem in this case was that the claimant accepted that he fully intended to resign on 19 February and that, on the analysis of **Willoughby**, that was the end of the matter, or should have been the end of the matter in this case. He submitted that effectively the claimant had conceded his case. He dealt with the **Paul v Virgin Care** case that I had provided to the advocates by submitting that allowing the claimant to make a concession in this case would not offend against the principles set out at [29]-[36] of that case, because he was not making a concession of law or as to his claim, but stating what his own factual case was as to his own state of mind. If, as he accepted, the claimant's state of mind was such that he intended to resign, that was the end of his case.

35. Mr Wilson submitted that it was important to consider whether the respondent ought reasonably to have understood that there was no intention to resign, but in this case the claimant did intend to resign. However, he agreed that there was no need for an employer to accept or reject a resignation for it to be effective.

36. As to the Tribunal's decision in this case, he submitted that what the Tribunal does at [24] shows that it asked itself the right legal questions and answered them. The Tribunal had properly considered the critical period after the words were spoken and found that the claimant had delayed too long in seeking to withdraw his resignation.

37. He argued that Mr Harding is wrong and that there was nothing more in the case that the Tribunal needed to consider given the claimant's concession. The Tribunal could be taken to have

read the evidence, and the use of the word *"altercation"* in [8] indicated that the Tribunal understood this was a 'heat of the moment' statement. The respondent's ET3 pleaded a clear factual position. There was nothing further that needed to be explored, particularly given the claimant's confirmation in the meeting on 21 February that he would send a letter confirming his resignation. The cooling off period was allowed and considered by the Tribunal, and the Tribunal gave adequate reasons for its conclusions at [24].

38. Mr Wilson submitted that the facts relied on by the claimant through Mr Harding on this appeal are not facts that were necessary to answer the legal issues and the other factual disputes between the parties did not need to be resolved in order to determine the legal issues.

39. He pointed to the claimant's email of 23 January (p 68) which he submitted is written as if he had resigned and wished to retract that, not in terms that he did not mean to resign in the first place. This underscores that the claimant is stuck with the effect of the orthodox rule.

40. (At this point, the claimant interjected to say that he had retracted his resignation at the first opportunity. I explained that he needed to communicate with Mr Harding any points that he wished to make and checked that he and Mr Harding were able to communicate with each other.)

41. As to the Tribunal at paragraph 16 identifying the principal issue of fact in contention as being whether an offer had been made, Mr Wilson submitted that the claimant had put in a 19-page witness statement and there is nothing to suggest that the judge did not take that evidence into account in reaching his conclusions.

42. He submitted that on the two previous occasions when the claimant had resigned, he had been talked back into his job. Consideration was given to doing that again on this occasion, but then the respondent decided against that. An employer does not have to allow an employee to change his mind.

43. Mr Wilson invited me, even if I find there was an error, not to remit this case because in

accordance with **Jafri v Lincoln College** [2015] QB 781 there was only one possible outcome in this case. The claimant intended to resign, and should not be allowed to resile from that, and so there was only one answer available in this case.

The claimant in reply

44. Mr Harding submitted that **Willoughby** does not actually say that if there are unambiguous words they cannot be resiled from. The submission from Mr Wilson seems to be that if the claimant had conceded his case, the judge did not understand the law enough to realise that he had conceded his case. He submitted that that was an acceptance that the judge had erred in law. Mr Wilson's approach was too binary and the case was more complex than that.

45. Mr Harding submitted that there was a lot the Tribunal did not consider including the two previous non-genuine resignations, and what happened in the 19 and 21 February meetings. In a nuanced case like this, there have to be proper factual findings.

46. The claimant did not need formally to retract his resignation earlier because he understood the 19 February meeting to be a reconciliatory one. It was only when he was told on 21 February that Ms Skinner did not want to work with him and the respondent wanted him to confirm his resignation in writing that he needed to retract his resignation.

The law

47. A claim of unfair dismissal can only be brought where an employee has been dismissed within the definition in section 95 of the **ERA 1996**. That section provides as follows:-

> **95 Circumstances in which an employee is dismissed.**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—**

> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
>
> **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or**
>
> **(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 employer's conduct.**
>
> **(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—**
>
> **(a) the employer gives notice to the employee to terminate his contract of employment, and**
>
> **(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;**
>
> **and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.**

48. In this case, the claimant's case was that he had been dismissed by his employer (i.e. dismissed within the meaning of s 95(1)(a)) when the respondent (Ms Anyanwu) informed him on 21 February 2020 that Ms Skinner could not work with him. The respondent's case was that this did not amount to a dismissal as the claimant had already resigned on 19 February 2020. A resignation is not a dismissal within the meaning of s 95 unless it falls within the terms of s 95(1)(c) (constructive dismissal), which the claimant was not (by the final hearing) contending in this case.

49. It is well established, and not in dispute on this appeal, that whether or not an employee is dismissed for the purposes of s 95 is to be determined by reference to 'ordinary' contractual principles (cf **Western Excavating (ECC) Limited v Sharp** [1978] QB 761 and **Aberdeen City Council v**

McNeill [2013] CSIH 102). The parties have not suggested (rightly, in my judgment) that the definition of dismissal in s 95 requires anything other than a standard contractual analysis as to whether the contract has terminated and, if so, whether: (a) by the employer, (b) by the occurrence of a limiting event under a fixed term contract, or (c) by the employee in circumstances where he is entitled to terminate without notice (i.e. in response to an employer's repudiatory breach). This is not a provision dealing with a statutory concept such as *"effective date of termination"* in s 97 (cf **Gisda Cyf v Barratt** [2010] ICR 1475).

50. The parties to this appeal agree that the conventional contractual position, applicable to dismissals within the meaning of s 95 and to 'ordinary' resignations, is that a notice of dismissal or resignation once given cannot be unilaterally retracted: see **Willoughby** at [25] and [37] (to which I return at the end of this review of the case law). This principle is well illustrated by **Denham v United Glass Ltd** *(UKEAT/581/98)* (*"***Denham***"*). This is not the earliest of the authorities I have been referred to, and I will come back to it in its proper sequence below, but it provides an appropriate starting point for considering the less conventional cases on the "special circumstances exception" on which the claimant relies in this appeal.

51. **Denham** was a decision of the EAT (Lord Johnston, Miss Ayre and Mr Speirs). In that case, the claimant had handed an unequivocal letter of resignation to his supervisor on 20 March 1997, who passed it on to the respondent's personnel department. Before the personnel department read the letter, the claimant informed his supervisor verbally that he wished to retract his resignation. The Tribunal found he had resigned and the EAT dismissed the employee's appeal. The EAT held, with reference to authorities that there is no need to detail here:

> **In approaching this matter, it is important to bear in mind that the general law of contract maintains a sharp distinction between repudiation on the one hand and notice of determination on the other.**

> **… once notice to determine a contract has been given, either by the employer or the employee, it cannot be withdrawn unilaterally. In the case of the employee that means that when resignation is intimated in clear and unambiguous terms, it need not be accepted by the employer in order to determine a contract. The contract is determined by the intimation of the notice which cannot thereafter be withdrawn unilaterally. Accordingly, in the present case, the attempts by the appellant to withdraw the notice or indicate his change of mind, are nothing to the point. For the situation to alter once the resignation was intimated there had to be the agreement of the employer which was not given in this case, since no offer to reinstate was made.**

52. I add that the 'sharp distinction' between repudiation and notice of determination referred to by the EAT in that passage is that a repudiatory breach does not operate to terminate the contract, unless and until accepted by the other party: see **Geys v Societe Generale** [2012] UKSC 63, [2013] 1 AC 523, where the Supreme Court resolved this point on which there had long been a dispute in the case law.

53. In deciding whether a notice of termination (whether of resignation or dismissal) has been effectively given, the parties to this appeal are also not in dispute that the orthodox position is that this is to be determined objectively, by reference to the language used and the circumstances in which it is used, including the matters within the knowledge of the parties at the time, but not by reference to the subjective intentions of the parties: see **Willoughby** at [26] and, for the general principles of contractual interpretation: **Rainy Sky SA v Kookmin Bank** [2011] UKSC 50, [2011] 1 WLR 2900, as reaffirmed in **Wood v Capita Insurance Services Limited** [2017] UKSC 24, [2017] AC 1173.

54. I now turn to consider the line of authorities that I have been referred to on this appeal dealing with less conventional termination situations, i.e. the 'special circumstances exception' cases as they are often referred to. The line of authorities begins with **Chesham Shipping Limited v C A Rowe** [1977] IRLR 391 (*"***Chesham***"*). The parties did not provide me with a copy of this decision (or a number of the other early authorities), but all the authorities that I have considered are referred to in

the authorities that the parties did provide. I have gone back to the full judgments in each case in order to extract fuller details of those cases in order to illuminate the later authorities. I indicated to the parties at the hearing that if when undertaking this exercise there appeared to me to be a new point on which the parties ought fairly to be given an opportunity to make further submissions, I would afford them that opportunity. In the event, however, it seemed to me that my review of the earlier authorities did not reveal any additional issue that the parties had not already had an opportunity to deal with at the hearing.

55. **Chesham** was a decision of the EAT (Phillips J, Mr Clement-Jones and Mr Thomas). The claimant and two other officers were summarily dismissed by their employer in a fit of temper. After calming down and ascertaining who was really to blame, the employer sought to reinstate the three officers, but the claimant did not consent to be reinstated and treated himself as dismissed. The EAT affirmed the orthodoxy that reinstatement or withdrawal of a notice of dismissal could not be achieved unilaterally, but made the following *obiter* observation:

> **It is important to note that this sort of situation arises frequently in cases that come before industrial tribunals, that is to say where the employer's representative, speaking in anger, behaves in a way which ordinarily he might not do and utters words of dismissal. In those circumstances industrial tribunals ought to be careful to ensure that what has taken place really is a dismissal, and not merely some words uttered for particular reasons which everybody quite understood were little more than abuse or something of that sort. The situation is not very different from the situation where it is said that the employee has resigned and where he, in a moment of emotion, says something like "well, I'll have my cards", and everybody understands, or should understand, that that is not seriously meant.**

56. The crucial elements of that *obiter* observation for are as follows: (i) unequivocal words of termination may not in law amount to a resignation or dismissal (as appropriate); (ii) whether they do or not is to be judged in all the circumstances of the case; (iii) an objective test is to be applied as to whether everybody 'understands or should understand' that the words not only constituted words of

termination but were 'seriously meant'. (I interpolate here that the phrase *"I'll have my cards"* or *"have your cards"* may strike those of us who are not old enough to remember workplaces of the 1970s as being a puzzling and highly ambiguous phrase. It is, however, clear from **Chesham** and the cases that follow that it was for some time a phrase in common parlance, along with *"have your books"*, and well understood as constituting words of dismissal or resignation.)

57. The next case is **Tanner v D T Kean** [1978] IRLR 110 (*"***Tanner***"*). The facts as they appear from the headnote are as follows:-

> **Mr Tanner had been instructed by his employer not to use the company's van outside working hours and had been lent £275 by the company to enable him to buy himself a car. On discovering that Mr Tanner was still using the company's vans for his part-time job as a doorman at a country club, his employer had lost his temper and said: "what's my fucking van doing outside, you're a tight bastard. I just lent you £275 to buy a car you are too tight to put to juice in it. That's it, you're finished with me."**

58. Mr Tanner claimed that he had thereby been dismissed, but the industrial tribunal found that he had not. The EAT (Phillips J, Mrs D Ewing and Mrs Sunderland JP) upheld the tribunal's decision. At [2]-[4] the EAT observed as follows:

> **2**
>
> **The question, surprisingly enough, is one which frequently comes before Industrial Tribunals and also, surprisingly enough, before us on appeal. The matter usually arises out of a loss of temper on one side or the other; the employers say words in temper which may or may not constitute dismissal, or employees, also in temper, say words which may or may not amount to resignation. We have had something to say about that before.**
>
> **3**
>
> **Turning to the appeal, the first thing to note is that there is only an appeal to us on a question of law. No doubt there are some words and acts which as a matter of law could be said only to**

constitute dismissal or resignation, or of which it could be said that they could not constitute dismissal or resignation. But in many cases they are in the middle territory where it is uncertain whether they do or not, and there it is necessary to look at all the circumstances of the case, in particular to see what was the intention with which the words were spoken.

4

In the present case the words are …: 'What's my fucking van doing outside; you're a tight bastard. I've just lent you £275 to buy a car and you are too tight to put juice in it. That's it; you're finished with me.' Part of the circumstances were that that was said in a country club to which Mr Tanner had taken the firm's van, and where he acted as a part-time doorman and had met Mr Kean, his employer. It seems to us — and although they do not say so, no doubt it seemed to the Tribunal — that those words, in all the circumstances of the case, were not as a matter of law in one category or the other; in other words, whether what was said constituted a dismissal depended on all the circumstances of the case. In our judgment the test which has to be applied in cases of this kind is along these lines. Were the words spoken those of dismissal, that is to say, were they intended to bring the contract of employment to an end? What was the employer's intention? In answering that a relevant, and perhaps the most important, question is how would a reasonable employee, in all circumstances, have understood what the employer intended by what he said and did? Then in most of these cases, and in this case, it becomes relevant to look at the later events following the utterance of the words and preceding the actual departure of the employee. Some care, it seems to us, is necessary in regard to later events, and it might be put, we think, like this: that later events, unless relied on as themselves constituting a dismissal, are only relevant to the extent that they throw light on the employer's intention; that is to say, we would stress, his intention at the time of the alleged dismissal. A word of caution is necessary because in considering later events it is necessary to remember that a dismissal or resignation, once it has taken effect, cannot be unilaterally withdrawn. Accordingly, as it seems to us, later events need to be scrutinised with some care in order to see whether they are genuinely explanatory of the acts alleged to constitute dismissal, or whether they reflect a change of mind. If they are in the former category they may be valuable as showing what was really intended.

5

> **It follows that in this case it has to be shown by Mr Griffiths on behalf of Mr Tanner, either that the Industrial Tribunal misdirected itself in point of law, or misdirected itself in point of fact, or that the decision was one which no reasonable Tribunal could have reached.**

59. The EAT in **Tanner** was thus making a number of points about the applicable principles, points which are not consistent with the *obiter* observation in **Chesham**. First, at paragraph 3, the EAT appears to take the view that if words are unequivocally words of dismissal, that is all that is required, there need be no further analysis and it is only if the words are equivocal (in that case *"you're finished with me"* spoken in anger) that a Tribunal need look further. Secondly, at paragraph 4, the EAT holds that what is key is what was *"really intended"* by the employer, but the EAT does not 'pin its colours to the mast' as to whether it is the subjective intention of the employer that matters or how it objectively appears to the employee in that situation or a 'reasonable bystander'. The EAT does indicate that the objective appearance is a relevant, and possibly the most important consideration, but on the face of that paragraph it would appear that if an employer adduced evidence that he did not at the time intend to dismiss that would suffice, even if that was how objectively it reasonably appeared to the employee. Finally, the EAT draws a distinction between the quest to divine from subsequent events what was the employer's real intention at the time from a subsequent 'change of mind' by an employer. Changes of mind, the EAT is clear, are not permitted.

60. The next decision in the chronology is **B G Gale Ltd v Gilbert** [1978] IRLR 453 (*"***Gilbert***"*). The facts as they appear from the headnote were:

> **Mr Gilbert became involved in a dispute with the head of the appellants' business, Mrs Simoni. He lost his temper and told her "I am leaving, I want my cards". Mrs Simoni took that to be a resignation in law and treated it as such. Mr Gilbert asserted that he had not intended to resign and claimed unfair dismissal compensation.**
>
> **An Industrial Tribunal found that what happened did not amount to a resignation because a**

> **reasonable employer objectively considered would not have so understood and that Mr Gilbert had not intended to resign.**

61. The Tribunal found that the claimant had been dismissed and the employer appealed. The EAT (Arnold J, Mrs Taylor MBE, Mr Hughes OBE) allowed the appeal, but granted leave to appeal to the Court of Appeal (which does not appear to have been pursued). The EAT opened its consideration of the case as follows at [4]:

> **The first question to be considered in our judgment is whether the language which was used, which the Tribunal found was used, was language which clearly upon its true construction meant, 'I am resigning' or whether it is ambiguous language. It is of course well known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not proper to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used. The matter of this sort of interpretation is extensively dealt with in a decision of this Tribunal in Tanner v D T Kean Ltd [1978] IRLR 110.**

62. The EAT went on to quote with apparent approval passages from the judgment of the EAT in *Tanner* that I have set out above, including paragraph 4 which, as I have noted above, is unclear as to whether a subjective or objective test applies. The EAT then went on to consider the **Chesham Shipping** case and notes the passage in it in which the EAT made reference to the phrase, *"Well, I'll have my cards"* as not being a resignation in circumstances where *"everybody understands, or should understand, that that is not seriously meant"*. The EAT in **Gilbert** observed that this was an invitation to the Tribunal, when in doubt about the effect of words used, to consider the subjective understanding of the parties. The EAT in **Gilbert** went on to hold that what the EAT in **Chesham Shipping** said about the phrase *"Well, I'll have my cards"* was *obiter* and that, in fact, the words *"Well, I'll have my cards"* meant unambiguously *"I am resigning"*. The EAT in **Gilbert** further observed that the Tribunal in that case had found as a fact that that was how the words were understood, and continued (at [10]): *"we very much regret that we come to the conclusion that in those circumstances that*

finding cannot be overridden by any appeal to what a reasonable employer should have or would have understood".

63. The EAT in **Gilbert** thus takes the view that although (see its paragraph 4 above) the subjective intentions of the giver of the notice (or sayer of the words) are not relevant, what is subjectively understood by the recipient is determinative – even if objectively something else should have been understood. The EAT reaches that view with regret because, as it goes on to point out, the consequence of it taking that view is that it opens the door to an opportunistic employer fastening on the intemperate language of the employee to bring about a convenient resignation of a difficult employee, even where the employee did not intend to resign and a reasonable employer would not have understood them to intend as such. Likewise, I observe, an opportunistic employee might fasten upon the words of an intemperate employer to claim unfair dismissal (with attendant compensation) when the employer did not intend to dismiss and a reasonable employee would not have so understood it.

64. The next case in the chronology is **Sothern v Frank Charlesly** [1981] IRLR 278 (*"***Sothern***"*), which was a decision of the Court of Appeal (Stephenson LJ, Fox LJ and Dame Elizabeth Lane) on appeal from the EAT. Mrs Sothern was a *"mature employee"*, of 44 years of age, and an experienced office manager. In the context of deteriorating relations between her and the firm's senior partner, at a partner's meeting she stood up at the end of the meeting and said she 'had something to say', which the tribunal found as a fact to be *"I am resigning"*, and she was thereupon thanked for her services. The next day she returned to the office, taking the view that she was staying on and that if the firm wanted her to leave, they would have to dismiss her. Eventually, she was told that she was regarded as having resigned at the partners meeting and that her resignation had been then accepted. She claimed that she had been unfairly dismissed and the claim succeeded before the Industrial Tribunal. The tribunal held that the words *"I am resigning"* were ambiguous, because they

could have referred to a future intention to resign and not a present intention, so that a reasonable employer would not have interpreted the words as a resignation in the circumstances of the case. The tribunal's decision was upheld on appeal to the Employment Appeal Tribunal. The employer's further appeal to the Court of Appeal was allowed. The Court of Appeal disagreed with the Tribunal and the EAT, holding that the words *"I am resigning"* were not ambiguous, that Mrs Sothern's resignation was therefore effective and she had not been dismissed.

65. The Court of Appeal was unanimous as to the outcome, but each judge expressed their views slightly differently as follows. Fox LJ gave the leading judgment:

> **19 As regards Mrs Sothern's intentions when she said "I am resigning", it seems to me that when the words used by a person are unambiguous words of resignation and so understood by her employers, the question of what a reasonable employer might have understood does not arise. The natural meaning of the words and the fact that the employers understood them to mean that the employee was resigning cannot be overridden by appeals to what a reasonable employer might have assumed. The non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is. That was the actual decision of the Tribunal in Gale v. Gilbert [1978] IRLR 453 and, in my view, it was correct.**
>
> **20 I should refer to three other matters. I have not lost sight of the fact that Mrs. Sothern returned to work on 7th November and stayed on for a few weeks. I do not find that inconsistent with the conclusion that I have indicated. A responsible employer may very well be expected to permit the employee to continue for a short time notwithstanding a resignation.**
>
> **21 Secondly, this is not a case of an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into a decision by the employers. Mrs Sothern was 44 years of age. She was an experienced office manager. It is true that she had an unhappy interview with Mr Franks on the afternoon of 6th November but that was some hours earlier. She delayed making any statement until the very end of the partners' meeting. There was nothing to suggest that any of the partners present were hostile to her.**

> **22 Thirdly, it is said that the requirements of a written contract was for the employee's protection. It was a requirement of a written notice. I see no reason to suppose that if, notwithstanding the contract, of which as an office manager Mrs. Sothern was well aware, she chose to resign and her employers were prepared to accept her resignation, there is any reason why her resignation should not have the normal legal consequences.**
>
> **23 In my view Mrs. Sothern was not dismissed by her employers and I would allow the appeal.**

66. I observe that Fox LJ at [19] affirms the orthodoxy that in matters of contract the question of whether the contract has been terminated and when is to be determined objectively so that, if unequivocal words of resignation are said, that suffices as notice of termination of the contract. However, Fox LJ also affirms what the EAT in **Gilbert** said to the effect that although the subjective intention of the person who utters the words of termination is not relevant, the subjective understanding of the recipient of those words is relevant, so that if the employer unreasonably concludes that an employee has resigned that is nonetheless sufficient to constitute a resignation. This (rather difficult) element of the **Gilbert** decision thus forms part of the 'normal rule' as Fox LJ sees it.

67. Fox LJ then goes on at [21] to lay out, *obiter*, the possibility of cases (referred to in subsequent authorities as 'exceptional cases') where the normal rule as he identified it to be might not apply. The cases to which he refers there (the immature employee, a decision taken in the heat of the moment, or an employee being jostled into a decision by the employers) are evidently non-exhaustive examples.

68. Dame Elizabeth Lane takes a slightly different approach at [25]-[26] as follows:-

> **25. It appears to me that there are three questions to be asked and answered:**
>
> **(1) What did the employee say?**

(2) What did the words she used mean?

(3) Did she mean those words?

As to the answers:

(1) She said 'I am resigning', as the Industrial Tribunal found.

(2) Those words, in my view, had the same meaning as 'I resign'. Both are in the present tense and, at any rate in the context of this case, both expressed an intention to resign then and there and were so understood and accepted.

(3) Those were not idle words or words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously. Nor was it a case of employers anxious to be rid of an employee who seized upon her words and gave them a meaning which she did not intend. They were sorry to receive the resignation and said so.

26. There is something to be said for the view of the man on the Clapham omnibus, particularly on a topic such as this, and if he were asked "who terminated this contract?" surely he would say, "Why, Mrs. Sothern, of course; she resigned". I also would allow this appeal.

69. Dame Elizabeth Lane thus does not affirm the **Gilbert** approach of ignoring the subjective intention of the person who speaks the words of termination, or of treating the subjective understanding of the recipient of the words of termination as determinative. As I read her judgment, she holds that unequivocal words of termination may nonetheless not in law amount to words of termination if they would reasonably be understood (objectively) as being idle words or words spoken under emotional stress that ought not to be taken seriously. She quite specifically differs from Fox LJ and the EAT **Gilbert** in holding that the subjective view of the recipient of the words is not determinative – it is an objective test.

70. Stephenson LJ at [30] agreed with both the judgment of Fox LJ and that of Dame Elizabeth

Lane, and does not deal with what I have identified as the point on which the two judgments differ. The basis for his judgment is, it seems to me, quite simply that unambiguous words of resignation had been used and accordingly Mrs Sothern had resigned. His judgment does not expressly acknowledge that there may be any exceptions where unambiguous words have been used.

71. The decision of the Court of Appeal in **Sothern** was next considered by the EAT in **J & J Stern v Simpson** [1983] IRLR 52 (Tudor Evans J, Mrs D Ewing and Mr R Thomas JP) (*"***J & J Stern***"*). The central facts of that case were that the business owner, who had been seriously ill, shouted at the claimant, *"Go, get out, get out"*. The claimant left and when he returned to the premises found the locks changed. The Tribunal, however, made no findings of fact about the surrounding circumstances or why the locks had been changed (the respondent's case being that it had been intended for some time to change them). The EAT allowed the appeal on the basis that the Tribunal had erred in law by making incomplete findings of fact as to all the relevant circumstances. In reaching that conclusion, the EAT rejected the submission of counsel that **Sothern** was authority for the proposition that unambiguous words were to be considered in isolation from all the circumstances of the case and that it was only in cases of ambiguity that one could look to the surrounding circumstances. The EAT held at [6] that the proper approach in all cases was *"to construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal"*. The EAT expressed the view that even Stephenson LJ in **Sothern** had in fact construed the words used against all the circumstances of the case. At [8] the EAT further held that the subjective intention of the speaker of the words was irrelevant and that the Court of Appeal's decision in **Sothern** was to be read as agreeing with that.

72. The next consideration of the **Sothern** case was by the EAT in **Barclay v City of Glasgow District Council** [1983] IRLR 313 (*"***Barclay***"*). In that case, the claimant was an employee of the parks department for the respondent local authority. He had an altercation with his manager which

ended with him saying he *"wanted his books"* the next day. The next day he was asked to sign a blank form that the respondent used when employment was terminated. The claimant is described in the judgment as being *"mentally defective"* – not a term that we would now use. He did not realise what had happened and reported for work on Monday, but was sent home by the foreman on the ground that he had resigned. The tribunal dismissed his claim for unfair dismissal, but on appeal the EAT (Lord McDonald MC, Mr Barrie Abbott and Mr McAteer) reversed the decision. The EAT applied Fox LJ's *obiter* paragraph [21] in **Sothern** to uphold the appeal as follows:

> **11**
>
> **It is true that if unequivocal words of resignation are used by an employee in the normal case the employer is entitled immediately to accept the resignation and act accordingly. This has been authoritatively decided by the Court of Appeal in Sothern v Franks Charlesly & Co [1981] IRLR 278 to which we were referred. It is clear however from observations made in that case that there may be exceptions. These include cases of an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into a decision by employers (Fox LJ at paragraph 21); they also apply to cases where idle words are used under emotional stress which employers knew or ought to have known were not meant to be taken seriously (Dame Elizabeth Lane, paragraph 25). There is therefore a duty on employers, in our view, in an appropriate case to take into account the special circumstances of an employee.**
>
> **12**
>
> **It may be that the majority of the Tribunal were correct in holding that when the appellant demanded his books on Thursday, 15.4.82, notwithstanding that it was in the heat of the moment, he meant it at the time. The real question however is whether or not in the special circumstances the respondents were entitled to assume that this was a conscious rational decision. It is true that the majority refer to the exceptional circumstances of the case but we do not consider that having regard to the observations in Sothern v Franks Charlesly & Co [1981] IRLR 278 it is sufficient to dismiss the unusual aspect of this case in this way. We consider that the proper approach is to have regard, not merely to what was said on 15.4.82, but to what happened the following day and**

> **indeed to the fact that the appellant did report for work on the following Monday apparently under the impression that he was still employed. At the very least there was, in our view, an obligation upon the respondents when the appellant reported on Friday, 16 April to seek some form of confirmation that his act of resignation was in fact a genuine one and fully understood. Instead of that they adopted what we consider to be the indefensible practice of requiring him against his will to sign a blank document which presumably on some subsequent occasion was filled in by them with the word 'resigned' written opposite the entry 'reason for leaving'. Further we agree with the observation of the dissenting member that in the special circumstances of this case a reasonable employer would at least have consulted with one of the appellant's sisters before assuming that the appellant meant the words which he had used. For these reasons we propose to allow the appeal.**

73. The approach of the EAT in **Barclay** was thus one that followed the **J & J Stern** approach of holding that even unambiguous words of termination need to be construed in context in all the circumstances of the case. The EAT applies an objective test of what a reasonable employer would understand in the context, and the ratio of the case confirms (contrary to the EAT in **Gilbert** and Fox LJ in **Sothern** that the subjective understanding of the employer is not determinative). The EAT further makes the focus of the question as to the respondent's objective understanding the question of whether the employee 'consciously and rationally' intended to resign, the answer to which the EAT accepts may be inferred from the employee's subsequent actions.

74. The next case in the chronology is **Martin v. Yeoman Aggregates Ltd** [1983] ICR 314 (*"***Martin***"*), a decision of the EAT (Kilner Brown J, Mr E Alderton and Mrs D Ewing). The facts of the case as they are recorded in the headnote were as follows:-

> **The employee, a transport manager, obtained the wrong spare part for a broken-down car. An angry exchange took place between one of the company's directors and the employee. The employee refused to collect the correct part and was dismissed by the director. A few minutes later the director, realising that he had said things in a fit of temper and that he was in breach of the correct disciplinary procedure, told the employee that he was suspended without pay for two**

> **days. Later the same day he asked the personnel manager to write to the employee saying he had been suspended for two days with pay but that he was expected to report for work after the two days' suspension. The employee refused to accept the contents of the letter and replied stating that the company's actions constituted instant dismissal. On his complaint of unfair dismissal an industrial tribunal found that there was no dismissal because the words were used in the heat of the moment and withdrawn almost immediately and before any decisive action could be taken.**

75. The EAT dismissed the employee's appeal on the grounds that the words were used in the heat of the moment and withdrawn almost immediately. Kilner Brown J, in delivering the judgment of the EAT, referred to the authorities of **Gilbert**, **Sothern** and **Tanner** and held:

> **14. ... It has obviously been contemplated in this Appeal Tribunal and has been contemplated for years that in the heat of the moment words which clear enough standing alone would indicate a dismissal can lose that effect if one looks at the surrounding circumstances. Of course, it must be a question of degree. Of course, you may get a situation in which the change of mind is so late that it is impossible to recover from the dismissory words expressed in the first place.**
>
> **15. We have no doubt whatsoever and, hoping that this matter may well be tested in the Court of Appeal, perhaps impertinently, confidently assert that it is a matter of plain common sense, vital to industrial relations, that either an employer or an employee should be given the opportunity of recanting from words spoken in the heat of the moment. We agree entirely with the first conclusion of the industrial tribunal that, having done what they did, withdrawing the original spoken words, saying that a man was suspended and telling him that, in the circumstances there was no dismissal ...'**

76. I observe that although the EAT in **Martin** does not recognise it, the decision in that case actually departs from previous authority in a very significant respect in expressly accepting a principle that an employer or employee may have an opportunity of 'recanting' and 'changing their mind' about a dismissal or resignation. That is a radical departure from the orthodoxy as expressed in **Denham** and **Tanner** that a resignation or dismissal once communicated cannot be withdrawn. Further, while

that may as a matter of fact be what in reality had happened in a number of the earlier cases, it is important to note that none of the earlier cases articulate the principle in those terms. The earlier cases took the principle to be that the question was whether the words of termination were 'seriously meant' (**Chesham**, **Gilbert**, Dame Elizabeth Lane in **Sothern**), 'really intended' (**Tanner**) or, albeit intended at the time, 'not a conscious rational decision' (**Barclay**). That **Martin** is out of line with the authorities in this respect is recognised by the Court of Appeal in the **Willoughby** case, which is the last in the line of authorities to which I come below.

77. The decision in **Sothern** came under scrutiny by the Court of Appeal again (May, Croom-Johnson and Woolf LJJ) in **Sovereign House Security Services Ltd v Savage** [1989] IRLR 115 (*"***Sovereign House***"*). The facts of that case are summarised in the headnote as follows:

> **Mr Savage was employed by the appellant company as a security officer. Following the discovery that money was missing from the company, Mr Savage was telephoned by the head security officer, Mr Price, and told that he was being suspended pending police investigations. Mr Savage responded by saying, *"I am not having any of that, you can stop it, I am not taking the rap for that"*. He then telephoned his immediate superior, Mr Scroggie, and told him that he would not be into relieve him the following morning as arranged. According to Mr Scroggie, Mr Savage agreed that he was "jacking the job in" and asked him to inform the duty inspector of the situation. Mr Scroggie said that he would phone Mr Price to tell him and Mr Savage agreed that he should do so. The employers treated Mr Savage as having resigned.**

78. The claimant in that case brought a claim of unfair dismissal which was upheld by the tribunal, the EAT and the Court of Appeal. May LJ giving the judgment of the Court of Appeal held as follows:-

> **7. In my opinion, generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view tribunals should not be astute to find otherwise. However, in some cases there may be something**

> **in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or herself, to entitle the tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight.**
>
> **8. We were referred in this connection to the earlier decision in this court of Sothern v. Franks Charsley & Co. [1981] I.R.L.R. 278 …**

79. May LJ then referred to the judgment of Fox LJ in **Sothern** at [19] and [21] and continued:

> **The learned Lord Justice was there contemplating the possibility to which I have referred, that if one is concerned with an immature employee or decisions taken in the heat of the moment, then what might otherwise appear to be a clear resignation, should not be so construed.**

80. He then referred also to the judgments of Dame Elizabeth Lane and Stephenson LJ and concluded that they were to the same effect. May LJ went on at [12]-[13] to point to evidence from Mr Savage that he had not intended to resign, and that Mr Price had not understood him as meaning that, so that it had been open to the Tribunal to reach the conclusion it did on the facts of that case. The **Sovereign House** case thus holds, as part of the ratio of the Court's judgment in that case, that evidence as to the subjective intentions of the speaker of the words is relevant, as well as evidence as to the subjective understanding of the recipient. The Court of Appeal does not, however, appear to have noticed that in holding that evidence of the subjective intention of the speaker of the words is relevant it was departing from **Sothern** in the Court of Appeal and also **Gilbert** and **J & J Stern** in the EAT. Significantly to the present appeal, though, May LJ does not suggest that the subjective intention of the speaker, or subjective understanding of the recipient, would be determinative of the issue. The Court of Appeal otherwise applies an objective test and it seems to me that, insofar as it held that evidence of the undisclosed subjective intention of the employee was relevant, that element of the judgment was *per incuriam* and out of line with other authorities, including the Court of Appeal's judgments in **Sothern** (above) and **Willoughby** (below).

81. The next case in the line of authority is **Greater Glasgow Health Board v Mackay** [1989]

SLT 729 (*"***Mackay***"*). In that case, the employee had an altercation with her superior the day after a disciplinary hearing. She stated that she was leaving and then wrote out a letter of resignation, which she addressed and delivered to the department manager, which he accepted. She did not return to work. Three weeks after writing her letter of resignation, she wrote asking to withdraw her resignation, to which the employer declined to agree. She complained that she had been unfairly dismissed. The ET held that she had and the EAT upheld its decision. The Court of Session allowed the employer's appeal. Lord Ross referred to **Sothern** and **Barclay** and held as follows at 732–733:

> **Far from the respondent's resignation having taken place when she was in a fit of temper or was suffering from acute anxiety, it appears that her resignation bore all the hallmarks of a deliberate and conscious act. No doubt she resented some things which Mr Martin had said, but she did not merely say that she was leaving but she took time to sit down and write a letter of resignation. That letter is well expressed and clear in its terms. It appears to me that even if it is assumed that her statement that she was leaving was made in the heat of the moment, the respondent had a full opportunity to reconsider the matter and, if so advised, to withdraw the resignation. Instead of that the respondent sat down and wrote out the letter of resignation, thus confirming what she had already stated orally.**
>
> **On the findings I am satisfied that there is no justification for thinking that the appellants knew or ought to have known that the resignation was not a conscious or rational decision. It was not a case of an employee flouncing out in a fit of temper, nor was it a case of an employee offering her resignation at a time when her employers knew or ought to have known that she was not herself but was suffering from an anxiety state.**

82. Lord Wylie, at 736, said this:

> **In essence, as I understood counsel for the respondent to concede, this is a "heat of the moment" case and I question whether the unambiguous language used by a mature employee of some years' standing at the time of the confrontation alone would have precluded the application of the general rule in *Sothern* so as to bring it within the exception. Be that as it may, the terms of the letter which she subsequently wrote are I my view conclusive and for these reasons I would**

> **allow the appeal. I would only add that where possible exceptions to a general rule are suggested in obiter dicta such as that used in the case of *Sothern*, there may be a tendency for tribunals to apply the exception to the rule rather than the rule itself and I wish to emphasise that only in highly exceptional circumstances will this be justified.**

83. Lord Cowie, after referring to the exceptional circumstances referred to by both Fox LJ and Dame Elizabeth Lane in **Sothern**, held at 737:

> **These exceptions are not as I understand the position meant to be definitive, because each case must turn on its own facts and circumstances, but they are meant to indicate the sort of situations where at first sight words are used or acts are done which clearly and unambiguously indicate that the employee is terminating his own employment or is being dismissed, but where special circumstances are present which ought to indicate to the employer or employee that that was not intended or at any rate put him on his guard and cause him to realise that the words or acts should not be taken at their face value.**

84. The next decision in the chronology is **Kwik-fit (GB) Ltd v Lineham** [1992] IRLR 156 (*"***Kwik-fit***"*). That was a decision of the Employment Appeal Tribunal. The facts are summarised in the headnote as follows:

> **The employee, a manager at one of the employers' depots, entered the premises at night to use the lavatory, deactivating and reactivating the alarm system as he did so. The next day he was questioned by security officers who had discovered that the premises had been entered and, although he immediately explained why he had entered the premises, he was given a written warning. The employee was angry, walked out and subsequently told the employers that he would take them to an industrial tribunal for unfair dismissal. On his complaint of unfair dismissal an industrial tribunal found that where there had been an unambiguous resignation but the words of resignation had been spoken in a moment of anger, an employer had a duty to check that the employee's true intention was to resign, that the employers had not done so and that the employee had been unfairly dismissed.**

85. The employer appealed. The EAT (Wood J, Mr Powell and Mr Springer) considered that the

tribunal had been wrong to express its decision in terms of there being a duty on an employer to check with the employee as to their intentions, but dismissed the appeal. The EAT reviewed the authorities that I have set out above, and held as follows at [31]:

> **Let us first look at the problem from the approach of sound management. As we have said the industrial members take the view that the way in which this industrial tribunal have expressed themselves puts too high a burden upon employers. If words of resignation are unambiguous then prima facie an employer is entitled to treat them as such, but in the field of employment personalities constitute an important consideration. Words may be spoken or actions expressed in temper or in the heat of the moment or under extreme pressure ("being jostled into a decision") and indeed the intellectual make-up of an employee may be relevant: see Barclay v. City of Glasgow District Council [1983] I.R.L.R. 313 . These we refer to as "special circumstances." Where "special circumstances" arise it may be unreasonable for an employer to assume a resignation and to accept it forthwith. A reasonable period of time should be allowed to lapse and if circumstances arise during that period which put the employer on notice that further inquiry is desirable to see whether the resignation was really intended and can properly be assumed, then such inquiry is ignored at the employer's risk. He runs the risk that ultimately evidence may be forthcoming which indicates that in the "special circumstances" the intention to resign was not the correct interpretation when the facts are judged objectively.**

86. It is thus from this decision that the term *"special circumstances"* is taken that has come to be applied to this line of authority generally. The EAT affirms the orthodoxy that normally unequivocal words of termination can be taken at face value, but also confirms that it is an objective assessment to be made in all the circumstances of the case as to what was 'really intended', and that in deciding what 'really intended' regard can be had to what happens subsequently.

87. Unfortunately, what follows this paragraph of the EAT's judgment in **Kwik-fit** needs to be treated with caution because, as the EAT in **Denham** observed, the EAT at [32] **in Kwik-fit** errs in law in treating a resignation by an employee as *"a repudiation of the contract of employment, a fundamental breach"* which thus requires to be accepted or rejected by the employer. That is wrong

because in almost all cases an employee will have an express or (occasionally) implied right to terminate the employment on notice and resignation will normally be in accordance with the contract and not a breach of it. Further, even where (as happened in **Sothern**) an employee fails to give notice in the form or for the duration required by the contract, that may be a breach but is unlikely to be a repudiatory one (*cf* the Court of Appeal's treatment of the employee's failure to put the notice in writing as required by the contract in **Sothern** at [22]). Given that error of law in **Kwik-Fit**, I do not consider that any reliance at all can be placed on the EAT's further observations in that case about the 'reasonable period of time' during which the subsequent conduct of the employee may be taken into account as relevant in deciding whether resignation was really intended, because what the EAT says there is predicated on its erroneous view that the employee's resignation required to be accepted by the employer before it was effective.

88. The next case in the chronology is **Denham** which I have already referred to for the orthodox principle that a resignation or dismissal once communicated cannot be retracted. However, that case also considered **Kwik-Fit** and rejected the claimant's attempt to rely on the 'special circumstances' exception as follows:

> **Mr Murray's [valiant] attempt to invoke the notion of "special circumstances" is also doomed to failure when that proposition is properly understood. It is perfectly clear to our mind from the cases, that "special circumstances" relate to whether or not the resignation was really intended, and thus bear upon whether it is given in clear and unambiguous terms.**

89. The EAT in **Denham** then referred to **Kwik-Fit** at [31] and continued:

> **This passage clearly focuses the circumstances where the issue of "special circumstances" may arise. We note that in the following paragraph, the Tribunal go on to equiparate resignation with repudiation of the contract of employment, and with respect with that proposition we would not agree. The giving of notice to terminate a contract of employment by the employee is a right which cannot be prevented by the employer from being exercised, although in certain**

> **circumstances such as failure to give sufficient notice specified in the contract, it might be treated as a breach of contract as well, giving rise to a claim for damages if it caused any loss. Equally a lawful determination by the employer may still give rise to statutory claims by the employee such as unfair dismissal. What must be clearly understood that the act of resigning, if clearly made, is not a repudiation of the contract requiring acceptance by the employer. It is a unilateral act determining the contract at common law. If there is doubt as to whether resignation is really intended, then the issue of "special circumstances" may come into play.**
>
> **In the present case there is no question but that the resignation when intimated was in clear and unambiguous terms, and there is no room for any notion of "special circumstances" not least with hindsight against a background that the appellant may have been depressed at the time.**
>
> **In these circumstances while we consider it singularly unfortunate that the employer chose to accept the resignation in the sense of not agreeing to take the employee back, that is nothing to the point. The matter requires to be determined by reference to the law.**

90. I remind myself at this point that the facts of **Denham** were that the employee tendered his resignation to his supervisor when stressed and depressed and then changed his mind and withdrew the resignation over the weekend and before the personnel department had read the letter. I cannot see that there is any principled justification for the difference in outcome as between **Martin** (where the employer rapidly changed its mind) and **Denham** (where the employee did), but it seems to me, for the reasons noted when dealing with the **Martin** case above, that it is the **Martin** case that is out of line with the other authorities and not **Denham**. I also note that in both **Martin** and **Denham** the result of the appeals was that the decision of the first instance tribunal was affirmed, which reflects the importance even in these cases of the tribunal's findings of fact at first instance.

91. The final authority is **Willoughby v CF Capital Plc** [2012] ICR 1038 (*"***Willoughby***"*), a decision of the Court of Appeal (Laws, Hooper and Rimer LJJ). The facts of that case were that Ms Willoughby and her manager had had a conversation about her potentially moving to self-employment. The line manager mistakenly believed that Ms Willoughby had agreed to this and sent

her a letter stating, *"we have been able to mutually agree to a change in your employment status and our working relationship will continue by your move into self-employment. The termination of your existing employment contract will be effective from 31 December 2008. Your agency agreement will commence 1 January 2009 …"*. Ms Willoughby took legal advice and then telephoned to say that she would not be accepting the self-employment arrangement, that she had not agreed to it and had been advised that the letter amounted to termination of her employment. The line manager sought to reassure her there had been a misunderstanding and that if she was not in agreement her employment could continue as before. She brought a claim of unfair dismissal, to which the employer's response was that she had resigned. The Tribunal dismissed her claim, finding that while, on the face of it, the December letter would have amounted to a dismissal, there were "special circumstances" to be taken into account. It said that a reasonable person, understanding the true outcome of the December meeting, would have realised on receiving the December letter that something was seriously wrong, that there had been a mistake and that the reference to termination of her contract of employment had been an error. The words had been withdrawn as soon as practicable after the claimant had alerted the employer to the mistake that it had made.

92. The Employment Appeal Tribunal ([2011] IRLR 198) held that the tribunal had not applied the correct test. Having correctly recognised that the December letter included unambiguous words of dismissal, it had failed to ask itself whether Ms Willoughby had been entitled to regard the dismissal decision expressed in the letter as a conscious, rational decision. It was not enough that, as the tribunal found, Ms Willoughby would have concluded from the letter that something was seriously wrong and that CFC had made a mistake. If the perception that the dismissing employer or the resigning employee was or might in some way have been mistaken in issuing a letter of dismissal or resignation was itself a "special circumstance", the exception would have overtaken the rule. Ms Willoughby and her lawyers had been entitled to take the letter of dismissal at face value. The employer appealed and the Court of Appeal (Rimer, Hooper and Laws LJJ) dismissed the appeal,

holding that the employer's mistake did not fall within the special circumstances exception.

93. Rimer LJ gave the judgment of the Court, setting out the legal principles as follows at [25]-[27]:

> **25**
>
> **First, the giving by an employer to his employee of a notice of dismissal cannot be unilaterally retracted, but may only be withdrawn by consent. See Riordan v The War Office [1959] 3 All ER 552, at 557I–558D; Harris & Russell Ltd v PSG Slingsby [1973] IRLR 221, at paragraphs [3] and [4].**
>
> **26**
>
> **Second, employment law is, at least in large part, a branch of contract law. The principles of contract law ordinarily require that a person's intentions are ascertained not by reference to his subjective intentions but objectively, by reference to how a reasonable man would interpret them. His intentions will therefore be ascertained by reference to a consideration of the words used, whether written or oral, in the context in which he used them. In the present case, the reasonable recipient of CFC's letter of 22 December would have no doubt as to what it meant or what its legal effect was. He might, given his assumed understanding that Ms Willoughby had not agreed to a switch to self-employment and that CFC knew that she had not, be surprised by the writing of such a letter to her. But such surprise would not require him to interpret it in other than its ordinary way.**
>
> **27**
>
> **Third, the 'special circumstances' exception to which I have referred is one that finds its expression and application in several reported authorities. They are cases in which either the employee has given an oral notice of resignation or (less commonly) in which the employer has given an oral notice of dismissal. The words of the notice so given may, on the face of it, be clear and unambiguous and may take effect according to their apparent terms. Indeed, the general rule is that they will do so. The authorities recognise, however, an exception to that general rule:**

> **namely, that the circumstances in which the notice is purportedly given are sufficiently special that it will or may not take such effect. For example, the words of notice may be the outcome of an acrimonious exchange between employer and employee and may be uttered in the heat of the moment such that there may be a real question as to whether they were really intended to mean what they appeared to say. In such circumstances it will or may be appropriate for the recipient of such a notice to take time before accepting it in order to ascertain whether the notice was in fact intended to terminate the employment. If he does not do so and, for example, simply (and wrongly) accepts an employee's purported resignation at face value and treats the employment as at an end, he may find himself on the receipt of a claim for unfair or wrongful dismissal. The general rule and the 'special circumstances' exception to it have been recognised in several authorities of both the EAT and this court.**

94. He then commenced a review of the authorities, including most of those I have referred to above. At [36] he quoted from the judgment of the EAT in **Kwik-Fit**, both [31] and [32], which latter paragraph contains the error that a resignation is a repudiatory breach of contract. Rimer LJ makes no comment about that error. The discussion and conclusion of the Court of Appeal in **Willoughby** is then as follows:-

> **37. The "rule" is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The "special circumstances" exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183 , 191, and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted.**

> **38. The essence of the "special circumstances" exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a "cooling off" period before acting upon it. Kilner Brown J in Martin v Yeoman Aggregates Ltd [1983] ICR 314, 318F, understandably referred to such a period as an opportunity for the giver of the notice to recant, or to withdraw his words; and this is in practice what is likely to happen. I would, however, be reluctant to characterise the exception as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. In my judgment, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place—that, in effect, his mind was not in tune with his words.**
>
> **39. That being the nature of the rule and of the "special circumstances" exception to it, I can see no basis for the application of the latter in the present case. CFC's problem is that, as Mr Boyd conceded, it intended by its letter of 22 December 2008 to dismiss Miss Willoughby. Its giving of such a notice may perhaps have been a mistake. But it was not one based on a misunderstanding by Mr Keeley that she had agreed to be dismissed on 31 December, because he knew that she had not. As Mr Banning submitted, the only rational explanation for his letter was a mistaken expectation on his part that she would accept the proposed self-employment terms, whereas she did not. All that she did was to accept the notice terminating her employment. The notice was clear and unambiguous and it terminated her employment just as CFC had intended. In my judgment it took effect according to its terms and, once given, CFC could not unilaterally withdraw it. The "special circumstances" exception provides CFC with no escape from that conclusion.**

95. The Court of Appeal in **Willoughby** thus brings a measure of coherence to the previous authorities, and the recognition that the "special circumstances" exception is not in truth an exception to the general rules about notices of termination in the employment context is significant in affirming that, even in these difficult cases, basic contractual principles still apply. However, although **Willoughby** is the last in this line of authorities, the two previous Court of Appeal authorities of

Sothern and **Sovereign House** are of equal value as precedents, at least insofar as **Willoughby** does not deal with and resolve points raised in those authorities, and there are also some aspects of this line of authority that have to date only been considered at EAT level.

96. Further, I observe that, by couching the legal principles in terms of what the recipient of words of termination would be 'well advised' to do, the Court of Appeal's judgment in **Willoughby** comes unfortunately close to imposing a 'duty' on the recipient of the words to take action, which was language which it seems to me was rightly deprecated by the EAT in **Kwik-Fit.** The difficulty with such language (which is not a necessary element of the Court of Appeal's judgment in that case) is that it wrongly gives the impression either that it is up to the recipient to decide whether there has been a dismissal/resignation or not (which cannot be right in the context of an objective test as to whether or not one party has unilaterally given notice) or that the issue for the Tribunal is not whether or not there has been a resignation/dismissal but whether the recipient has failed in his/her 'duty' to check whether there has. Neither impression is helpful. It seems to me, with all due respect to the earlier authorities, that it would be better to express the legal principles straightforwardly as principles that need to be applied by a court or tribunal when dealing with such cases. That can be done without doing any damage to the principles enunciated in the earlier cases.

97. With that very considerable preamble, the principles applicable to the construction of (putative) notices of dismissal or resignation in the employment context seem to me in the light of the authorities to be as follows:-

> (1) There is no such thing as the 'special circumstances' exception; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context. That is the view that the Court of Appeal took in **Willoughby**, and the judgment in **Willoughby** is, it seems to me, consistent with the judgments of the Court of Appeal in **Sothern** and **Sovereign House**, which did not use the language of

'exceptions'.

(2) A notice of resignation or dismissal once given cannot be unilaterally retracted (**Willoughby** at [25], and **Denham**). The giver of the notice cannot change their mind unless the other party agrees (**Martin** is wrong on this point insofar as it suggests otherwise: see **Willoughby** at [38]).

(3) Words of dismissal or resignation, or words that potentially constitute words of dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation (**Willoughby** at [37]).

(4) Rephrasing Lord Hoffmann's well-known dictum from **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1988] 1 WLR 896 to fit the dismissal/resignation situation, the circumstances that may be taken into account in my judgment include 'absolutely anything' that was 'reasonably available' to the parties (i.e. that they knew or ought to know) 'that would have affected the way in which the language used would have been understood by a reasonable bystander'.

(5) The perspective from which the words used are to be judged is that of the reasonable bystander in the position of the recipient of the words used, i.e. where the employee resigns, the relevant perspective is that of the employer who hears the words of resignation; where the employer dismisses, the relevant perspective is that of the employee (cf **Willoughby** at [26]).

(6) What must be apparent to the reasonable bystander in that position, objectively, is that:

i. the other party used words that when construed in accordance with normal

contractual principles constitute words of immediate dismissal or resignation (if the dismissal or resignation is 'summary') or immediate notice of dismissal or resignation (if the dismissal or resignation is 'on notice') – it is not sufficient if the party merely expresses an intention to dismiss or resign in future (cf the Tribunal's decision at first instance in the *Sothern* case); and,

ii. the dismissal or resignation was 'seriously meant' (**Chesham**, **Gilbert**, Dame Elizabeth Lane in **Sothern**), or 'really intended' (**Tanner**, Lord Cowie in **Mackay**, **Kwik-Fit**, **Willoughby**) or 'conscious and rational' (the EAT in **Barclay** and Lord Ross in the Court of Session in **Mackay**). Henceforth in this judgment, I will use only the term 'really intended', but the alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign/dismiss and also to be 'in their right mind' when doing so. I must add a word of caution, however, about the use of the word 'rational' in this context: it is not part of the test that resignation or dismissal needs to be 'rational' in the sense of reasonable. It may be completely unreasonable for the employee to resign or the employer to dismiss, but the resignation/dismissal will still be effective if it reasonably appears to have been 'really intended'. That said, if the speaker of the words appears to be acting irrationally, as in 'not in their right mind', then that will be a circumstance in which it should be concluded that the words were not 'really intended').

(7) In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were 'really intended' and the analysis will stop there: **Sothern**, **Sovereign House** at [7] and **Willoughby** at

[37]). A Tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were 'really intended' unless one of the parties has expressly raised a case to that effect to the Tribunal or the circumstances of the case are such that fairness requires the Tribunal to raise the issue of its own motion.

(8) The point in time at which the objective assessment must be carried out is the time at which the words are uttered (**Sothern**, **Sovereign House** and **Willoughby**; again **Martin** is wrong insofar as it suggests otherwise). The question is whether the words reasonably appear to have been 'really intended' at the time they are said.

(9) However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended' at the time (see **Tanner** at [4], **Barclay** at [12] and **Willoughby** at [27] and [38]). If that leads to the conclusion that it was not 'really intended' at the time (as in **Tanner**, **Martin** and **Barclay**) then the putative notice will not have been effective. If, however, consideration of subsequent events leads to the conclusion that, objectively, resignation/dismissal was 'really intended' at the time but the giver of the notice has since changed their mind (as in **Mackay** and **Denham**), then the notice stands as when originally given and the change of heart is of no legal effect (unless accepted by the other party). The distinction between the two situations is likely to be very fine because, as the Court of Appeal observed in **Willoughby** at [38], even in the cases where it has been held the resignation/dismissal was not 'really intended' at the time, it is likely that the giver of the notice did intend to give the notice at the time (in the sense that the giving of the notice was not an accident and was heartfelt at the time) and thus that the giver of the notice could be described (as happened in **Martin**) as subsequently 'recanting' or 'having a change of heart'. The distinction between the

'not really intended' and 'change of mind' cases is, though, a real one, long established in the authorities, and it is a matter for a Tribunal to decide on the particular facts on which side of the line a case falls.

(10) There is no limit to the period of time after the putative resignation/dismissal to which the Tribunal can have regard, but common sense suggests that, the longer the time that elapses, the more likely that any evidence will not be evidence of the person's intention at the time but, rather, of a subsequent impermissible change of mind.

(11) The sorts of circumstances that might lead to a conclusion that, objectively, the sayer or writer of the words did not have the necessary 'real' intention at the time, as drawn from both the *obiter* and actual examples in the case law, include where the speaker: is angry and behaves out of character (**Chesham** - obiter); is angry and overhasty (**Martin**); is just plain angry (**Tanner**, **Sovereign House**, **Kwik-Fit**); has a relevant mental impairment or is immature (**Sothern** and **Barclay**); or is under extreme pressure/'jostling' from another party (**Sothern** and **Kwik-Fit** both *obiter*). However, none of those circumstances necessarily mean that the words of termination were not 'really intended'. Thus, the dismissals/resignations were held to be effective in the authorities despite the giver of notice being angry (**Tanner**, **Gilbert**, **Mackay**), stressed or depressed (**Denham**), or mistaken about the other parties' wishes (**Willoughby**). Again, which side of the line a case falls is a question of fact for the Tribunal.

(12) The uncommunicated subjective intention of the speaker is not relevant (**Sothern** at [19] *per* Fox LJ, **Willoughby** at [26]; the Court of Appeal in **Sovereign House** was wrong insofar as it held otherwise, as were some of the earlier authorities such as **Tanner**). However, any communication by the speaker of the words to the

other party in the relevant period thereafter as to their subjective intention will be relevant evidence to take into account in assessing the position objectively.

(13) What the recipient of the words subjectively understood is relevant evidence as it may assist the Tribunal in forming a judgment as to what the reasonable bystander would have thought, but it cannot in my judgment be determinative. Dame Elizabeth Lane in **Sothern**, the EAT in **Barclay**, and the Court of Appeal in **Sovereign House** are right in this respect, while the EAT in **Gilbert**, and Fox LJ in **Sothern** are wrong. There are three reasons for this: (i) so to hold would be inconsistent with an objective test; (ii) it would mean that all the cases where the other party took what was said at face value, but the Tribunal subsequently decided they should not have done, were wrongly decided; and, (iii) it allows opportunistic employers/employees to take advantage of words spoken that are not 'really intended' either to 'get rid' of an employee who did not really want to resign and who could not have been fairly dismissed or to 'manufacture' an unfair dismissal claim against an employer who did not really intend to dismiss.

(14) Finally, the same rules apply to written notices of resignation or dismissal as to oral ones (**Willoughby**, [37]), save that where a notice is given in writing that will normally indicate a degree of thought and care that will make it less likely that there are circumstances which, objectively, would lead the reasonable bystander to conclude that the notice was not 'really intended' (cf **Denham, Willoughby** and **Mackay**).

98. I turn now to consider the specific circumstances of the present appeal.

Conclusions

99. Although it is properly an argument as to how I should dispose of the appeal in the event I

find there is an error of law, it is convenient to deal first with the respondent's argument regarding the claimant's acceptance, as recorded in paragraph 8 of the Tribunal's decision, that he intended the words he used on 19 February 2020 to be understood as being his resignation and that the words were so understood by Ms Skinner. The respondent's argument is that, if that was factually the position, then as a matter of law the claimant's resignation on 19 February 2020 was a resignation, and effective immediately as such.

100. However, in the light of my analysis of the authorities as set out above, that is not how the law works in this context. For the reasons I have set out above, the question of whether an employee in the position of the claimant in this case has resigned is to be determined objectively from the perspective of the reasonable bystander viewing the matter from the employer's perspective. The uncommunicated subjective intention of the employee is not relevant to the issue the Tribunal has to decide, although what the claimant said to his employer about his intentions in the relevant period after uttering the words of resignation will be relevant to the objective assessment. Likewise, what Ms Skinner subjectively understood is not determinative, although it is relevant evidence as it may assist the Tribunal in forming a judgment as to what the reasonable bystander would have thought. As such, the fact that the claimant agreed that he had in the moment intended to resign and been understood as resigning was not determinative. The claimant's intention was irrelevant and the employer's understanding was only relevant evidence and not determinative.

101. I now turn to consider Mr Harding's arguments on behalf of the claimant. It seems to me that there are unfortunately material errors of law in the Tribunal's approach in this case.

102. First, the Tribunal has not properly directed itself by reference to the principles that I have identified above. That is understandable given that there has not prior to this judgment been any case which has drawn together the principles as I have done in this judgment, but nonetheless the result is that the Tribunal in this case has not directed itself by reference to those principles. In particular, it

has not directed itself by reference to what I have identified as the core question of whether, viewing the situation objectively from the perspective of the reasonable employer, the claimant not only used words that when construed in accordance with normal contractual principles constituted words of resignation, but also that objectively it would have appeared to the reasonable employer that the claimant 'really intended' to resign on 19 February 2020. Instead, the Tribunal at [24] asked itself whether there were here special circumstances that justified making an exception to the general rule. However, as I have explained above, there is no such thing as the special circumstances exception and the Tribunal erred in law in asking itself whether there were special circumstances that justified departure from the general rule rather than applying an objective test to determine whether it would have appeared to a reasonable employer in all the circumstances that the claimant 'really intended' to resign.

103. Secondly, it is well established that a Tribunal needs to give adequate reasons for its decisions and in order to do so it must make the findings of fact that are necessary to that decision: see, for example, **Jocic v Hammersmith and Fulham LBC** (UKEAT/0194/07/LA; HHJ Burke QC presiding) at [57], endorsing the views of the EAT (Judge Richardson presiding) in **Peart v Dixons Store Group Retail Ltd** (UKEAT/0630/04/1011). In the present case, the Tribunal has not made the findings of fact necessary to enable it properly to answer the core legal question. In particular, it has not made findings of fact about three crucial elements of the chronology:-

(1) *The morning of 19 February 2020* – The Tribunal has made no findings about what actually happened on the morning of 19 February 2020 when the claimant said the words of resignation, no findings about what words he used (indeed, the Tribunal at paragraph 8 noted that a dispute between the parties as to the words used was 'not relevant to the determination of the claims') or how he appeared at the time. These elements of the case were crucial because the question of whether it objectively

appeared at the time that the claimant 'really intended' to resign requires consideration of not just whether unequivocal words of resignation were used but also how the claimant appeared at the time: was he angry? Was the language used the sort of language he would normally use? Did he appear to be 'in his right mind'? These are the sorts of questions that a tribunal may find it helpful to consider, together with the evidence about the previous occasions on which the claimant had 'resigned' and then 'reconsidered'. It may be that all these occasions were instances of the claimant really intending to resign and then changing his mind and the respondent accepting that change of mind. Whether they were or not is a question of fact for the Tribunal to decide, but when applying the objective reasonable bystander test to the last occasion it is necessary to attribute to that bystander the knowledge of the previous occasions and take those into account in deciding whether, against that background, it reasonably appeared that the claimant 'really intended' to resign on the last occasion.

(2) *The afternoon of 19 February 2020* - The Tribunal has also made no findings of fact about the meeting on the afternoon of 19 February 2020, other than considering the evidence about whether he was offered an alternative position which the Tribunal identified at paragraph 16 as being 'the principal issue of fact in contention'. There are no findings at all about the matters pleaded in paragraphs 3 to 6 of the claimant's (very short) ET1 about how the meeting began with Ms Anyanwu asking about the argument (in a way that may indicate she was not assuming he had resigned), about the claimant telling Ms Anyanwu that he had 'blown up' as a result of his grievances and the personal pressures he was under with caring for his parents, or how the claimant asserted that the meeting ended with an agreement that he and Ms Skinner could continue working together so that there was (on the claimant's case) no need for the claimant formally to withdraw his resignation. In other words, on the claimant's case,

the meeting ended with it being apparent to the respondent that he had not 'really intended' to resign. Elements of this account were, of course, disputed by the respondent and the Tribunal needed to resolve those factual disputes in order to decide the case. However, it did not even mention these facts in its judgment.

(3) *The meeting of 21 February 2020* - Nor are there any findings of fact about how the meeting on 21 February 2020 began. The claimant's case was that it started with Ms Anyanwu saying: *"before you say anything [Ms Skinner] has decided that she cannot work with you and therefore your resignation will stand"*. That factual allegation was important to the question that the Tribunal should have been considering. The Tribunal needed to decide whether that was how the meeting began and, if so, (i) whether it pointed towards the claimant's case that he had not really intended to resign, and that the respondent knew that the outcome of the meeting on the afternoon of 19 February 2020 was that he intended to stay in his job, with the consequence then being that these were effectively words of dismissal by Ms Anyanwu, or (ii) whether it was merely consistent with the respondent's case that the claimant had in law given an effective resignation on the morning of 19 February 2020 and everything that followed was merely a discussion between the parties as to whether he should be allowed to retract that resignation. The claimant's case about how the meeting of 21 February 2020 began was also crucial context to his agreeing at the end of the meeting to put his resignation in writing. Having ignored the claimant's case about how the meeting began, the Tribunal was able to take his agreeing to put his resignation in writing at the end of the meeting as being evidence that he had really intended to resign on 19 February. However, the agreement to put his resignation in writing looks very different if in fact the situation was that Ms Anyanwu had at the beginning of the meeting in law dismissed him and then 'jostled' him into resigning

(to use the language of **Sothern**).

104. Thirdly, I need to say something about the Tribunal's focus in this case on the question of whether the respondent had offered him an alternative role. While I would not go so far as to say that that issue was irrelevant to the matter the Tribunal had to decide (because the whole factual matrix is relevant in a case such as this), it is clear to me that this issue became an unfortunate 'red herring' in this case. If the claimant had resigned, then the offer of a new role was simply an offer of a new contract and not capable of affecting the status of his prior resignation. If he had not resigned, then whether or not the offer of a new role amounted to a termination of his then current contract would need to have been considered by reference to the principles discussed in the line of authority beginning with **Hogg v Dover College** [1990] ICR 39. Either way, consideration of whether the respondent had offered the claimant an alternative role was a side issue and could not assist much, if at all, with the question of whether he resigned on 19 February 2020.

Disposal

105. None of the above should be taken as indicating that either party is more likely ultimately to succeed in this case. It is, it seems to me, a finely balanced case. I have considered the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. This case was decided at a one-day hearing that took place over two years ago. It is unlikely the judge has a good recollection of it and in any event no time would be saved by remission to the same judge. Further, while I do not doubt the judge's professionalism, the decision was substantially flawed and fairness requires in my judgment that the case be remitted to a fresh tribunal. The fresh tribunal will need to conduct a full rehearing, properly directing itself in law in accordance with the principles that I have identified in this judgment at [97] above, and making the necessary findings of fact to enable it properly to determine on which side of the fine line between 'not really intending to resign' and 'intending to resign but changing his mind' this case falls.

106. I add this further observation: it seems to me that this case was under-listed at first hearing and that may in part explain the deficiencies I have identified in the judgment. Six witnesses and an issue of this complexity merited more than a one day listing and it should be given a more generous allocation on re-listing.