

Neutral Citation Number: [2023] EAT 164

Case No: EA-2021-001459-BA

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London EC4A 1NL

Date: 7 December 2023

Before:

HIS HONOUR JUDGE BARKLEM

Between:

**BTU (INSTALLATION AND MAINTENANCE)
LIMITED**

Appellant

- and -

MR J COGGIN

Respondent

MR PETER COLLYER, Tribunal Consultant for the Appellant
THE RESPONDENT appeared In Person

Hearing date: 7 December 2023

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The ET held that the circumstances under which the Claimant resigned and then sought to revoke that resignation were such that the respondent ought to have allowed the revocation, and that its failure to do so constituted an unfair dismissal.

However, its reasons failed to explain why the ET evidently chose to disbelieve evidence from the respondent's witnesses which was at odds with the claimant's version of events, evidence which was not set out in the reasons. In the circumstances the respondent could not know why it had lost. The appeal was allowed, and the matter remitted to a newly constituted tribunal.

HIS HONOUR JUDGE BARKLEM:

1. In this judgment I shall refer to the parties as they were before the tribunal. This is an appeal against the decision of an Employment Tribunal chaired by Employment Judge Burns sitting with members Mr Ashby and Mr De Chaumont-Rambert with reasons given on 22 July 2021. Mr Collyer appeared for the respondent today, as he had below, and Mr Coggin appeared in person. Each made brief submissions for which I am grateful.

2. The claimant had worked for the respondent as a boiler engineer from 2006 until the termination of his employment on 20 July 2020. I understand his intention was to retire the following year. The circumstances giving rise to that termination were that on 14 July 2020 he attended a job assigned to him but was unable to locate an emergency gas valve in a particular property. It transpired that he had simply not looked properly.

3. On 17 July, a Friday, the claimant's manager, Ms King, telephoned him to ask about this issue. The claimant became upset and went home early. On the following Monday he asked for a meeting with Ms King at which Mr Turnbull was also present. Following a brief conversation, the claimant offered his resignation. He was given a piece of paper and a pen and asked to write it out. There was some discussion about holiday pay and in due course the claimant was written to confirming that his employment was at an end.

4. Some days later on 24 July the claimant's wife telephoned Ms King, in the course of which, on her account, she told Ms King that the claimant had changed his mind and wanted to be allowed to retract his resignation. On 5 August, (a delay explained to me today by Mr Coggin as arising from Covid which meant it was difficult to get a doctor's appointment) his GP wrote to the respondent explaining that the claimant had been suffering with a history of anxiety and depression and had been on regular medication for many years. It went on to say that he would now like to withdraw the resignation as he feels he was not in a proper frame of mind when he resigned due to the stressful

situation, he was in. The respondent refused to accept the retraction, stating, inaccurately, that someone had already been recruited to fill the position.

5. Proceedings were commenced in the tribunal alleging disability discrimination and constructive unfair dismissal. Mr Coggin had assistance with the drafting of that, but that person did not continue to represent him. Neither the pleadings nor the issues as set out following a case management discussion made reference to what was the plain issue between the parties so far as dismissal is concerned – that is whether the claimant’s resignation ought or ought not to have been treated as such by the respondent given the heated situation in which it is said the decision was made. Mr Collyer tells me today that it was only when giving closing submissions that the tribunal made reference to this. Hitherto, it had been a standard constructive dismissal claim.

6. The tribunal held that the parties were fully alive to the true nature of the issue and that there was no prejudice to the respondent in allowing the matter to be dealt with on the true facts. The witness statements had, indeed, covered the relevant factual background. The disability discrimination claim was dismissed as the tribunal held that the respondent was unaware that the claimant suffered from depression. It also held that there had been no repudiatory breach by the respondent. However, it went on to hold in effect that there was a dismissal because the respondent was not entitled to treat the claimant’s resignation as genuine and reliable.

7. This appeal was permitted to proceed to a full hearing by Judge Auerbach on all grounds. Those grounds are, compendiously, that the tribunal did not refer to all the relevant evidence, nor to issues of conflict in the evidence and did not explain why it chose to accept the version that it did. Moreover, having regard to the case law, there was no proper explanation for the tribunal having held that this was one of the rare cases in which an employer should treat a resignation as having been made in haste in the heat of the moment and allowing a cooling off period given the timescales in this case.

8. The section of the reasons headed “findings of fact” set out an account which was essentially that given by Mr Coggin and his wife. I have seen the witness statements of Ms King and Mr Turnbull which were before the tribunal. They assert clearly that the resignation was not in the heat of the moment and that no pressure was put on the claimant. Ms King says that she asked the claimant, “Are you sure that this is what you wanted to?” to which he replied yes and gave her a hug.

9. She also says that she spoke to the claimant on 23 July and discussed the holiday calculation when he said nothing to indicate that he regretted having resigned. She also produced a text message which she had received from the claimant at 5pm on 22 July saying that his van was ready to be picked up. The statement refers to a conversation with the claimant’s wife after the conversation with the claimant on the 23rd but makes no reference to mention of the claimant wishing to retract his resignation. The conversation was apparently about the calculation of holiday pay.

10. The tribunal referred to the relevant case law, in particular **Kwik-Fit v Lineham** in which it was held that in those cases where an employer should allow a period of time before accepting a resignation made in the heat of the moment, that period was likely to be “a day or two”. The tribunal’s finding that the resignation was given in the heat of the moment and under pressure from Ms King, indeed at her suggestion and that she wanted the claimant to resign and hastily facilitated and secured a resignation letter is wholly at odds with the account given by her and supported by Mr Turnbull who was present.

11. It is entirely unclear to the reader of the judgment why the tribunal chose to disbelieve these two witnesses. It is also unclear why there was no reference to the conversation said to have taken place with the claimant on 23 July, nor to the text about the van being ready to be picked up. Each of those must be of relevance. In saying this, I stress that I make no findings on the underlying facts. However, given such a conflict of evidence the respondent is plainly entitled to know why it lost. This was plainly an error of law on the part of the tribunal and the decision must be quashed and the

matter remitted to a fresh tribunal to be reheard. As there is no longer any disability element, it may be that a judge sitting alone will hear it.

12. When he addressed me, Mr Coggin referred to the background to the case, in particular to his having worked during the Covid pandemic and the serious worries that he had arising from his wife working in a care home at the time. He expressed understandable concern and dissatisfaction about the length of time these proceedings have taken to get here. I have great sympathy with him. He has done nothing to cause this delay. The award in this case was, in the context of tribunal claims, relatively modest, although I am sure of considerable importance to him. I would express the hope that the parties could consider settling the matter rather than having it drag on yet further.

13. The appeal succeeds and the matter is remitted to a differently constituted Employment Tribunal.