EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110014/19

Held on 2, 3 and 4 December 2019

Employment Judge N M Hosie

Mr Robert S Rae	**Claimant** **Represented by** **Mr N Fraser, Solicitor**
Wellhead Electrical Supplies Limited	**Respondent** **Represented by** **Mr M Anderson, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed.

REASONS

1. Robert Rae claimed that he was unfairly dismissed by the respondent. The respondent denied that they had dismissed him. They maintained that he had resigned voluntarily. A Final Hearing was fixed in respect of liability only.

The Evidence

2. On behalf of the respondent I heard evidence from:-

    - Charles Ogg, Finance Director and Company Secretary
    - Greg Rastall, Director
    - Yvonne Gibb, part of the claimant's sales team

3. I then heard evidence from the claimant and on his behalf from:-

    - Mark Rae, the claimant's son
    - Linda Rae, the claimant's wife

4. A Joint Inventory of documentary productions was lodged by the parties ("P").

The Facts

5. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact. The respondent Company is a supplier of electrical products to the offshore oil and gas industry. It employs some 16 individuals at its site in Aberdeen. The Company was formed in 1990. The claimant was the founder of the Company in a management buyout. The claimant was the Managing Director and Sales Director. He was joined shortly thereafter as Directors by Charles Ogg and Greg Rastall.

6. I should perhaps record, at this stage, that the claimant gave his evidence at the Tribunal Hearing in a measured, consistent and convincing manner. He presented as credible and reliable.

7. From early 2019, Company employees repeatedly asked the claimant about salary increases. There had not been any increases since 2014 due to a downturn in business. The claimant was concerned that if this was not addressed it might result in valued employees leaving. The claimant was very much in favour, therefore, of awarding increases and he raised the issue on a number of occasions with his fellow Directors, and in particular with Mr Ogg, the Finance Director. It is not necessary for me to record in any detail the exchanges between the three Directors about salary increases, or comment on whether anyone was being unreasonable, as this was not material to the principal issue with which I was concerned, namely whether or not the claimant was dismissed. Suffice to say, that it was not disputed that it became, as the respondent's solicitor put it, *"a fraught issue of contention"* among the Directors with the claimant pushing for increases and being met with resistance from his fellow Directors in respect of some of the increases he proposed.

8. On 7 February, the claimant sent an email to Mr Ogg with his proposals for a "general increase" for the "sales office" (P8/1). He also suggested three "exceptions" for employees who would be awarded higher increases: "Charlie" who was a junior member of staff in the sales office; the claimant's son, Mark, and Yvonne Gibb who both worked directly for him.

Board Meeting on 25 February 2019 (P10)

9. The issue of pay increases was raised at the next Board Meeting but deferred (P10/2). A resignation letter from "G Barclay" was also raised at that meeting (P10/2). The Minutes record that Mr Ogg suggested that, *"the content of the letter be considered very carefully prior to any Employment decisions".* The claimant was of the view that were Mr Barclay to leave the saving of his salary would cover his proposed pay increases.

Board Meeting on 7 March 2019 (P12)

10. The claimant disputed these Minutes which he claimed he had never seen. He believed that at that Meeting the 5% "general increase" was agreed, as were the three "exceptions" which he had proposed. He advised his son, Mark, and Yvonne Gibb, therefore, that their salaries would increase, by approximately 25%, to £35,000.

11. However, both Mr Ogg and Mr Rastall gave evidence that it was only the 5% "general increase" and the increase for "Charlie" which were agreed.

12. I was unable to make a finding in fact, one way or another in this regard. To determine the issues with which I was concerned, I did not need to do so. However, I was satisfied that the claimant believed that all the salary increases had been agreed. That was why he told his son Mark and Yvonne Gibb of their increases.

13. However, when the next monthly salary payment went through the claimant discovered that Mark and Yvonne had only received the 5% general increase. The claimant said he was *"devastated"* when he learned this. He was also embarrassed as he had told them that their salaries would be increased by much more. When he asked Mr Ogg for an explanation and he told him *"it wasn't justified".* That was why the claimant sent the following email on 14 March to Mr Ogg (P13/1):-

> *"You asked for justification re the salary reviews. I included these on this email sent to you on the 7th Feb (P11).*
>
> *Last Thursday (7 March) we agreed Graham* (Barclay) *leaving made these increases neutral re the budget, this was we agreed" (sic)*

14. Mr Ogg replied by email on 19 March (P14). He suggested that a Board Meeting be convened the following day. One of the issues he listed for discussion was *"Regrading of staff".* This related to the proposed salary increases for Mark Rae

and Yvonne Gibb. The increase which the claimant had proposed for "Charlie" had gone through.

15. The claimant asked Mr Ogg the following day when the Board Meeting was going to take place. Mr Ogg advised him that it would be held the following morning on 21 March. However, by the afternoon of 21 March the meeting had still not taken place.

Thursday 21 March 2019

16. Just after 2 pm that day, therefore, the claimant went into Mr Ogg's office and sat down at his desk opposite him. When the claimant asked about the meeting Mr Ogg, who was due to go on holiday the following day, said *"I haven't got time",* or words to that effect.

17. The claimant then asked if the salary increases had gone through for Mark and Yvonne. Mr Ogg said that they had not. The claimant said in evidence that, *"that was the straw that broke the camel's back".* He felt as if he had lied to his son and Yvonne Gibb by telling them their salary increases had been agreed. He said that he, *"felt betrayed by my fellow Directors".*

18. The claimant became very angry when Mr Ogg told him this. He threw his keys on Mr Ogg's desk and shouted, *" I told you what was going to happen".* This was a reference to at least one previous informal discussion he had with Mr Ogg when he told him that he would *"walk"* if all his proposed salary increases were not agreed. Mr Ogg claimed that the claimant also said, *"I resign"* and Mr Rastall claimed that he overheard him say this. However, as I recorded, the claimant's evidence was both credible and reliable and he denied saying *"I resign";* Mr Rastall was in an adjoining office at the time and it was clear from subsequent events and his demeanour at the Tribunal Hearing that he bore the claimant considerable ill will. I took the view that his evidence in this regard was nether credible nor reliable. On the evidence, therefore, I was unable to make a finding in fact that the claimant had said *"I resign".* However, what he did say and his actions were consistent with him resigning. He left the office immediately and did not return to work that day.

19. After he left the claimant had to return as he had left his mobile telephone. When he returned he told Mr Ogg, *"I won't be back".* He also said to Mr Rastall in a loud voice *"I believe I've just resigned*", or words to that effect. Mr Rastall could not recall the claimant saying that, but I was satisfied that he did. The claimant alleged that in response Mr Rastall said "*Thank fuck. Good riddance"* and that that *"really hurt him*". This was denied by Mr Rastall. However, I had the claimant's clear evidence that he did say that and he was credible and reliable; Mr Rastall bore the claimant ill will; and he conceded at the Tribunal Hearing that he *"wasn't unhappy"* that the claimant had left. On balance, therefore, I decided that Mr Rastall had used these words as the claimant left.

20. The claimant was very distressed when he left the respondent's offices. He sat in his car for a time. He was in tears. He then went home. Yvonne Gibb telephoned him at home that afternoon. He could not recall what was discussed but his wife told him that he had been *"rude"* to her. He told her in response to a work-related matter she had raised: *" do whatever as I won't be coming back".* He did think about returning to the office but said he *"was in no state to do anything".*

21. Within 10 minutes or so of the claimant leaving the office Mr Rastall told the claimant's son, Mark, that his father had resigned and he and Mr Ogg advised the workforce shortly after that.

Board Meeting on 21 March 2019

22. Mr Ogg and Mr Rastall arranged an "emergency meeting" of the Board at 16:30 on 21 March, some 2 hours after the claimant had left. Minutes of the meeting were produced (P15). The claimant was not given a copy.

23. The Minutes recorded that, *"Mr Rae's actions were a direct result of three previous threats to resign should his son Mark and assistant YG not be given payroll increases outwith the current salary scale structure".* However, when Mr Ogg was asked about this in cross examination at the Hearing he accepted that there had

only been two such occasions. The claimant had not used the word *"resignation"* on those occasions, but Mr Ogg claimed that in *"informal discussions"* what the claimant said, *"amounted to that".*

24. The Minutes also recorded the following:-

> *"Greg discussed the previous hostile attitude of Mr Rae at the previous Board Meeting and both OGG & Greg unanimously agreed to accept his resignation".*

Friday 22 March 2019

25. The following morning, the claimant tried to telephone Mr Ogg around 0930 to tell him he was stressed, had not intended to resign, he would be going to see his Doctor that day and that he intended to take some time off and return when better. However, Mr Ogg had gone on holiday to Norway and he could not contact him. He then telephoned Mr Rastall. The call was brief. It lasted less than a minute. He told Mr Rastall that he was, *"suffering badly from stress and would have to take time off"* and would be going to his Doctor. However, according to the claimant Mr Rastall *"talked over him"* and said: *"You are no longer fucking MD. I am and I'll see you in fucking Court"*. He then hung up. I was satisfied that that was what Mr Rastall said. The claimant was a credible and reliable witness and Mr Rastall's comment was consistent with other evidence I heard and his animosity towards the claimant. Although they had worked together for almost 30 years, Mr Rastall said at the Tribunal Hearing that he was, *"quite happy with Rab resigning".*

26. The claimant consulted his GP that day and he was signed off work until 5 April 2019 because of *"stress at work".* At 11:23 that day the claimant sent his "sick line" (P19) to Mr Rastall along with the following message (P17):-

> *"Greg,*
> *This is to inform you that I will NOT be resigning from Wellhead Electrical, I am signed off with work related stress.*
> *Rab"*

27. Mr Rastall did not reply.

28. The claimant also sent the following "WhatsApp" message to Mr Ogg that day from his mobile telephone at 13:23 (P16):-

> *"Hiya well I have calmed down considerably now and am going to take some time off work to see if I can get rid of the stress I am suffering. I will NOT be resigning. I have tried to call you but no reply maybe you can give me a call when you get a chance.*
> *Rab"*

Greg Rastall's letter to the claimant

29. Mr Rastall sent a letter on 22 March to the claimant in the following terms (P18):-

> *"I refer to the situation which developed in the course of 21st March 2019, essentially culminating in you making clear, in unequivocal terms, that you were resigning as an employee and Director of the company with immediate effect and leaving the premises. As discussed over the phone earlier today, the company has accepted your resignation and does not accept that you have simply chosen to take time off: such a suggestion simply does not accord with the actual events of the day.*
>
> *I will now arrange to process your resignation and will ensure that you are paid all sums due to you. I may need you to sign forms formalising your resignation as a Director but will revert to you on that later if need be".*

Saturday 23 March 2019

30. The claimant sent a letter on 23 March to Mr Ogg and Mr Rastall in the following terms (P20):-

> *"Dear Charlie and Greg,*
>
> *Following the incident that occurred on Thursday 21st March 2019, I wish to clarify the situation as there seems to have been some misunderstanding. Notwithstanding what may have been said in the heat of the moment, it was not, and is not, my intention to resign from the*

company in any capacity. I do not accept the assertions made in your letter dated 22nd March 2019 (P18) regarding Mr Rastall's understanding of the events of that day.

I also wish to inform the company that following the incident, per the enclosed Statement of Fitness for Work issued by my Doctor, I have been advised that I am not fit for work due to stress at work and will not be fit to return to work until 5th April 2019 at the earliest. This is the sole reason for my actions on Thursday 21st March 2019 and subsequent absence."

31. Mr Rastall replied by letter on 25 March in the following terms (P21):-

"Thank you for your letter dated 23rd March.

There is however little I can add to my letter to you from 22nd March. As said in that letter, you made clear on 21st March that you were resigning from the company with immediate effect and you then acted on that decision by leaving. This resignation was absolutely not a decision taken in the heat of the moment but was a decision which you had clearly been building to over time and the words used by you at the time (and which were of course witnessed) take the question of whether you resigned beyond any doubt: there is no question of any misunderstanding as to the position or to your actions being misinterpreted. I appreciate that you may have since had a change of heart but your resignation has been accepted and it is simply not open to you to unilaterally withdraw it.

In short, you are no longer a Director or employee of Wellhead Electrical Supplies Limited. That being the case, please ensure that you do not interfere any further with the business of the company by communicating with members of staff, nor communicate to any company on behalf of the company (Wellhead Electrical Supplies Limited).

Should you wish to retrieve personal items from the premises please arrange with me a suitable time. Please do not attend the company premises outwith a prior arrangement.

Finally, I note the terms of the Statement of Fitness for Work which you have since copied me into. This of course refers to an assessment of fitness made on 22nd March, being a date subsequent to the effective date of termination of your employment, and I have no record of any previous such assessment. That being the case, I do not see this document having any relevance to your earlier decision".

32. Mr Rastall also sent an email that day to all members of staff in the following terms (P22):-

> *"On behalf of the Board of Directors, I take this opportunity to advise you that Rab Rae last week resigned as an employee and Director of the company. The company has accepted and acknowledged his resignation as taking place with immediate effect.*
>
> *As Rab is no longer an employee of the company any business related matters or matters not of a personal nature or subject are of no concern to him and should not be discussed nor communicated verbally nor information passed. Any future communications relating to this subject (Mr Rab Rae) will only be by the Board of Directors or via our representative's solicitor (Michael Anderson at Shepherd & Wedderburn)."*

33. The claimant had also sent an email to all members of staff in the weekend following his resignation. It was in the following terms (P23):-

> *"To the staff of Wellheads*
>
> *I appear to have been locked out of my Wellheads email account so I am emailing you from my personal email as I feel it is important to clarify things.*
>
> *Notwithstanding what you may have been told, I wish to clarify the situation following last Thursday's events that resulted in me leaving the office. I can confirm that I have not resigned from the company and it was never my intention to do so regardless of how my actions in the heat of the moment may have been interpreted by others in the company.*
>
> *If you are wondering where I was on Friday, as some of you may be aware I have been under a great deal of stress recently and have since Thursday been signed off for stress at work by my doctor for the time being.*
>
> *I am available to talk should you wish to speak to me about work or anything else.*
>
> *I look forward to seeing you all soon and to returning to work once I get my head together".*

34. The claimant was also under some stress at home as he was caring for his wife who had fractured her leg on 1 February and was unable to walk up and down

stairs. This meant the claimant had to do a considerable amount of work at home. He was also worried about his wife's health. Both Mr Ogg and Mr Rastall were aware of this.

35. On 28 March, Mr Rastall sent a letter to the claimant with the request that he return all company property, including the company car (P24)

36. As soon as Mr Ogg returned from holiday, he sent a P45 to the claimant.

Respondent's Submissions

37. The respondent's solicitor spoke to written submissions which are referred to for their terms.

38. In support of his submissions, he referred to the following cases:-

> ***Martin v Yeoman Aggregates Ltd*** [1983] ICR 314
> ***Sothern v Franks Charlesly and Co Ltd*** [1981] IRLR 278
> ***Sovereign House Security Services Ltd v Savage*** [1989] IRLR 115
> ***Greater Glasgow Health Board v Mackay*** 1989 SLT 729
> ***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183
> ***Ali v Birmingham City Council*** *UKEAT/0313/08*
> **CF PLC v Willoughby** *[2011] EWCA Civ 1115*

39. The submissions by the respondent's solicitor concentrated, quite properly, on the events of 21 March 2019. He submitted that:-

> "*The Claimant expressed, to one of his fellow directors, a clear and unequivocal intention to resign from his position within the company and that with immediate effect, that following this he confirmed what he had done to the other director, and that he did so while in sound mind and fully aware of what he was doing and why he was doing it".*

40. He submitted that Mr Ogg was *"absolutely clear in his recollection"* that the claimant, *"made 2 specific statements in the course of his resignation meeting".* The first statement was: *"I've told you what's going to happen".* This was, it was

submitted, *"with reference to a previous discussion on or around 14th March when Mr Rae, after discovering that a pay increase he believed was to be made to his son was not in fact confirmed, had suggested he might put on his jacket and leave".*

41. The second statement which the claimant made was, *"I resign … after making a show of fetching his keys from his jacket and placing them firmly on Mr Ogg's desk".*

42. The respondent's solicitor also invited the Tribunal to accept Mr Rastall's evidence that immediately thereafter the claimant went into his office and confirmed to him *"I've just resigned".*

43. It was also not a matter of dispute that the claimant then left the office shortly after 2 pm and did not contact either of his fellow Directors in the course of that day.

44. The respondent's solicitor submitted that it was *"highly significant"* that the claimant made no attempt to contact his fellow Directors that day even though he knew that Mr Ogg would not be available the following day as he was due to go on holiday. It was also significant, it was submitted, that the claimant did not report for work the following day at his normal time. He submitted that, *"even at that point Mr Rae considered that he had resigned and was testing the waters on a possible return".*

45. The respondent's solicitor also challenged the credibility and reliability of the claimant's evidence in relation to his actions, *"in the immediate aftermath of the resignation".* His evidence was that he said to Mr Rastall, *"I think I've just resigned".* He doesn't say: *"Charlie thinks I've just resigned or I think I've accidentally just resigned or anything similar".* Also, later that afternoon, he told Yvonne Gibb that he *"would not be back".*

46. The respondent's solicitor submitted that the claimant, *"was of the view at the material point in time – the point when he spoke to Mr Ogg and handed in his keys – and certainly for some time afterwards that he had indeed resigned and this*

puts him completely into line with Mr Ogg and Mr Rastall. Even if there is any dispute as to the specific words which were used by the 3 individuals, there was, quite simply, clear consensus as to what had just occurred".

47. So far as the events of the following day were concerned, the respondent's solicitor submitted that the claimant, *"introduced into the equation"* that he was being signed off work with work related stress rather than having resigned. However, Mr Rastall maintained that the claimant had resigned and, *"rejected any notion that he had 'chosen to take time off'.*

Case Law

48. The respondent's solicitor submitted, with reference to ***Sothern***, that *"as a general rule, once an employee has spoken unequivocal and unambiguous words of resignation, his employer can take them at face value and accept the resignation and that it is not open to the employee to retract the resignation without the employer's consent".*

49. The respondent's solicitor accepted that there can be exceptions to the general rule and referred again to ***Sothern***, "*where the Court of Appeal identified 'special circumstances' which may apply that might mean that an otherwise clear and unambiguous resignation cannot be absolutely relied on by an employer as having that effect"*. However, ***Sothern*** and ***Greater Glasgow Health Board***, *"have clarified the limited nature of the exception to the general rule".*

50. He submitted that while it was accepted that the claimant was angry at the relevant time, there was nothing to suggest that he, *"was not of perfectly sound mind or that he did not know what he was doing"*. He submitted that this was not a, *"heat of the moment situation. There was a situation being discussed over time, with Mr Rae having chosen his moment to speak with Mr Ogg when he could have had the conversation at any time previous to this – and in fact did so, on 14th March".*

51. The respondent's solicitor accepted, with reference to ***Kwik-Fit***, that *"where special circumstances arise it may be unreasonable for an employer to assume a resignation and to accept it forthwith … and that 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 enquiry is desirable to see whether the resignation was really intended and can be properly assumed, then such enquiry is ignored at the employer's risk".*

52. However, he submitted that these special circumstances *"need to be exceptional"* and that they did not arise in the present case. There is no authority for any *"cooling off period".* All that is required of an employer is to consider whether the resignation was really intended. The respondent's position in the present case is that it was.

53. ***Ali*** applied the principles in ***Kwik-Fit***. In that case Mr Justice Silber spoke of, *"the very limited nature of the exceptions set out in the Sothern case"* and emphasised that, even where special circumstances are found to exist, *"it <u>may</u> be unreasonable for the employer to assume a resignation" underlining that word".*

54. Nor were special circumstances held to exist in **CF Capital** where there was clear and unambiguous notice of an intention to terminate the employee's contract.

Summary

55. The respondent's solicitor said this by way of summary:-

> *"So, the respondent's position is clear. For a period of at least 6 weeks prior to the claimant's resignation, the claimant had been seeking to persuade Mr Ogg to agree to a salary increase and potential new role for the claimant's son, and a pay increase for another employee who was a friend of the claimant. His annoyance built up over this period and in consequence of this he resigned. His words and actions were clear and he clearly intended to resign with immediate effect.*
>
> *The claimant was a senior and sophisticated employee. The claimant was not pressured into his decision by the respondent, and his decision was*

not taken in the heat of the moment, having stated on a previous occasion that if his proposal was not supported he would "walk".

The respondent honestly and reasonably construed the claimant's words as a resignation.

The undisclosed intention of the speaker is not relevant. The appropriate test is how the words would have been construed by a reasonable listener. A reasonable listener hearing the words "I resign" on their own or, as is the case here, accompanied by the context of the speaker having threatened to "walk" if a situation – which had occurred – were to occur, the speaker returning his office key, confirming to another colleague "I've resigned", and leaving the office, would reasonably conclude that the speaker had resigned with immediate effect.

This was the reasonable conclusion reached by the respondent on 21 March 2019.

There were no special circumstances at play here, the claimant being a mature individual, of sound mind and fully aware of his actions and their meaning. He was not pressured into his decision.

The respondent had no duty to let him change his mind".

Claimant's Submissions

56. In support of his submissions, the claimant's solicitor referred to the following cases:-

Quarter Master UK Ltd v Pyke, High Court (Ch.) 15th July 2004 (unreported)
Willoughby
Sothern
Barclay v City of Glasgow District Council [1983] IRLR
Ali
Kwik-Fit
CMS Dolphin Limited v Simonet [2002] B.C.C. 600

57. He spoke to *"Skeleton Submissions"* which are referred to for their terms. He first set out the facts and then addressed the issue of whether or not the claimant had been dismissed or resigned voluntarily.

(1) "Communication in terms excluding room for doubt"

The claimant's solicitor submitted, with reference to ***Quarter Master***, that:

> *"Whether a statement by an employee is to be construed as an offer to resign depends on whether it is beyond reasonable doubt that it communicated such an offer……..*
>
> *On the evidence the claimant did not say that he was resigning. He said nothing about resigning to Mr Ogg. His only use of the verb "resign" was to Mr Rastall and was qualified. Plainly a man knows whether or not he has resigned, so the qualification is critical; at the highest for the respondent's argument, it necessarily communicated that there was an element of doubt about the matter.*
>
> *The central point is that a Managing Director who at the only moment in time when it is suggested that he may have resigned does not express himself in clear terms, such as to say, "I resign and that is final", does not communicate unambiguously an intention to resign.*
>
> *The question is not simply whether there was any ambiguity – but whether what is, how it is said, and the circumstances in which it is said, leaves no reasonable scope for doubt.*
>
> *Here there is every room for doubt. The exchanges in which the respondent's case depends took place after a significant build-up of emotion between the principals and took place over no more than a minute or two of time, in the informal context of 2 brief, standing encounters in their workplace. The claimant said no more than at most ten crucial words in total to Mr Ogg and Mr Rastall between them on which the respondent's case is periled. They met with no requests for oral clarification or confirmation, still less with any suggestion that the matter be put in writing. It would be an extraordinary proceeding for a long-established, successful business to deem its Managing Director to have terminated both his employment and his directorship in such a sudden, brief, informal, unwritten, ambiguous manner.*
>
> *That is reflected in the fact that when Mr Rastall wrote the next day to assert that the claimant had resigned, he claimed that the claimant had used "clear … unequivocal terms" but was unable to say what they had been. There is no credible or reliable evidence that the claimant had done so".*

(2) "Whether the words used were meant"

The claimant's solicitor submitted that, "*If the claimant said that he was resigning, but objectively is not to be taken to mean what he said, then he did not resign".*

The claimant's solicitor referred to the following passage from the Judgment of the EAT in ***Willoughby****: "The fundamental question for the Tribunal to consider will be: in the special circumstances, was the person to whom the words were addressed entitled to assume that the decision which they expressed was a conscious rational decision"*?

58. He also referred to the following passage from the Judgment of Dame Elizabeth Lane in ***Sothern***:

> *"Words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously"* are not a resignation; *neither are statements where "employers are anxious to be rid of an employee who seized upon [their] words and [gave] them a meaning [they] did not intend".*

59. He also submitted, with reference to ***Ali***, that words spoken in anger can be discounted.

60. The claimant's solicitor also submitted that whether or not an employer knew or ought to have known that the words spoken were meant to be taken seriously, *"is integrally bound up with whether an employer ensures that an employee has an opportunity to confirm his position because that is precisely the most reliable way of knowing whether or not what was said was meant.* ***Ali*** *outlines the relevance of this at paras 11(c), 28 and 30".*

61. The claimant's solicitor also referred in his submissions to the following passage from the Judgment of the EAT in ***Kwik-Fit*** at P.191:-

> *"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 … 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 enquiry is desirable to see whether the resignation was really intended and can properly be assumed, then such enquiry is ignored at the employer's risk".

62. The claimant's solicitor submitted that the respondent's Directors, in the present case, had done *"precisely the opposite".* Neither Mr Ogg nor Mr Rastall asked the claimant at the time what he meant, they did not offer him an opportunity for reflection or ask for written confirmation.

63. He submitted that:-

"The immediately ensuing facts are relevant to what the claimant was to be understood to mean.

It is important to emphasise this point, because it is what the respondent's case seeks to leave out. Para. 10 of the ET3 makes it clear that the respondent's whole case for voluntary resignation depends on looking only at what happened in a minute or two after about 2 pm on the afternoon in question. They require the adoption of blinkers so as to judge parties rights exclusively on the basis of that extremely narrow snapshot. That is because what happened next entirely undermines the case for alleging the claimant to have formally resigned.

Within 24 hours he had by text message (and Whatsapp) and within 48 hours by letter, the claimant had (sic) *left the respondent in no possible doubt that he had not intended to resign and was not resigning.*

In the result, therefore, as soon as it is accepted, as it must be, that the relevant sequence of events which is to be considered extends to 22nd March, the sole basis on which the respondent's case has been presented to the Tribunal automatically fails.

In reality, what happened was that the actual reaction of the respondent – with Mr Rastall apparently being the moving spirit – was to proceed exactly as the Court of Appeal and the EAT expressly deprecate in ***Kwik-Fit*** *and* ***Sothern***

- *by seizing upon words spoken under emotional stress*
- *by someone whom they were anxious to be rid of*
- *allowing no time to elapse whatsoever still less a reasonable period of time*
- *not putting the employee on any notice about the desirability of clarification*

- *but determining instead to proceed immediately and at the respondent's own risk*

A further aspect of the matter is that, absent express agreement to the contrary in a service contract, the contractual relationship of an employed Director as an employee cannot be terminated without reasonable notice".

64. He submitted, with reference to ***CMS Dolphin***, that *"reasonable notice is a question of fact and degree".* The respondent's position that the claimant terminated his employment with no notice necessarily involves an allegation that he breached his contract. However, Articles 80 and 106 of the Company's Articles of Association require a Director to give written notice. It is inconceivable, it was submitted, that a Director would intend to terminate his service contract without also resigning from the office of Director.

65. It was submitted that, *"it is completely implausible that he purported to terminate his service contract while remaining in his statutory office of Director and where there is any doubt, parties are to be presumed not to act in breach of contract and not to intend to breach their contracts …*

The ten or so words founded upon by the respondent, in what was unquestionably a very brief exchange in the heat of a clash of personalities promptly followed by steps which the respondent plainly deliberately intended to completely exclude any opportunity of a reflection or confirmation, are not on any interpretation the manner in which the formal termination of a 29 year long legal relationship is to be taken to have been reliably and bindingly communicated".

"**Precedents"**

66. The claimant's solicitor submitted, with reference to ***Quarter Master***, that, *"any communication has to be understood in context. The context here includes the long working relationship between the individuals concerned. Within that, an aspect of specific relevance are previous occasions when an individual's resignation had been mooted and how that had been previously been treated".*

67. It was submitted that in 2009 Mr Rastall submitted a letter of resignation to the other Directors. He was afforded an opportunity to reconsider and having done so he remained in the respondent's employment. It was also submitted that Mr Battensby, a previous Director of the Company and an employee, was afforded an

opportunity to reconsider his decision to resign; there was also a similar approach extended to non-Board members such as Mr Barclay.

68. It was submitted that:-

> *"Against that mutually-known background the reasonable understanding of parties on 21st March was that a communication of an intention to resign would be subject to an opportunity to consider and either confirm or withdraw the suggestion. Separately, given the precedents, the claimant had a legitimate expectation of having that opportunity. That is not simply theoretical, because of course on the facts on 22nd March the claimant communicated to Mr Rastall, and by text message to Mr Ogg, that he was not resigning, and he repeated that by letter to each on the next day again, 23rd March. But most fundamentally, against that background, none of the three Directors objectively considered that a stated intention to resign, in anything less than final and categorical terms would be held to be irrevocable."*

"Did the respondent accept the claimant's resignation?"

69. It was submitted that there was no offer of resignation to accept.

70. However, it was submitted, that Mr Rastall's attitude, towards the claimant, in particular, was *"revealed"* and that was, *"an emphatic wish to be rid of the claimant…..the striking haste and categorical language of Mr Rastall was not a natural or considered response to an unambiguous offer of resignation, but an emphatic expression of anxiety to seize the occasion as an excuse to treat the claimant's employment as terminated.*

The respondent's evidence – particularly Mr Rastall's – has to be considered carefully in the light of that clear animus against the claimant. It is plainly on the cards that that affects either or both his credibility and his reliability. In plain terms, he had and has an axe to grind, and both on 21st March and in these proceedings his strong motivation has been a wish to find a way to be rid of the claimant.

The second point is that absent an unambiguous offer to resign, the respondent's communications to him on and between 22nd and 28th March in purportedly treating him as having resigned are necessarily communications of a decision to dismiss him. It is common ground that the respondent is treating the employment as having been terminated. … there is no middle ground … the company dismissed him.

The conclusion is that the respondent dismissed the claimant. Absent any fair reason for doing so, or absent any fair procedure for reaching that decision, that dismissal was unfair".

Discussion and Decision

71. The general rule is that unambiguous words of resignation may be taken at their face value without the need to consider all the surrounding circumstances, what the employee actually intended or what a reasonable employer would have understood them to mean in light of those circumstances. The leading case is ***Sothern***. In that case the Court of Appeal held that the oral statement, *"I am resigning"* was unambiguous and that concluded the matter.

72. I first considered, therefore, whether the claimant had used unambiguous words of resignation when he spoke to Mr Ogg in particular and also to Mr Rastall, in passing, on 21 March 2019. I did not find this at all easy as there was a conflict in the evidence I heard. However, as I recorded above, the claimant presented as credible and reliable and I found in fact that he said to Mr Ogg, *"I told you what was going to happen"* before he threw his keys on Mr Ogg's desk. This was a reference to the claimant advising Mr Ogg previously that he would *"walk"* if the salary increases he had proposed, and in particular the *"exceptions"*, were not implemented.

73. He also said to Mr Rastall *"I think"* or *"I believe I've just resigned*". Although Mr Rastall said he could not recall the claimant saying that, that was the evidence of the claimant, a credible and reliable witness and it was corroborated by Mr Ogg who overheard him using such words.

74. Although I did not find in fact that the claimant said to Mr Ogg *"I resign*", as he alleged, when I considered the words the claimant used and how he acted, namely throwing his keys on Mr Ogg's desk leaving the office and not returning that day, I came to the view, albeit with some hesitation, that what he said and did that day on the face of it, without considering the context and all the circumstances, amounted to an apparently unambiguous resignation.

"Special circumstances"

75. Nevertheless, in ***Sothern*** the Court acknowledged that there may be circumstances where it is appropriate to investigate the context in which the words were spoken. For example, where what was said was in the heat of the moment or under pressure. I was of the view that this was just such a case. I was of the view that, in the particular circumstances of this case, there was doubt as to whether the claimant really intended to resign.

76. I went on to consider, therefore, whether there were the sort of *"special circumstances"* referred to in ***Sothern*** which would entitle me to decide there was no resignation, despite appearances to the contrary. In doing so, I had regard to all the surrounding circumstances.

77. The claimant had threatened previously to "walk" if his proposals for pay increases, especially the "exceptions", were not implemented. The salary increases was a matter he had raised often and was clearly of great importance to him. However, I do not consider that what he said and did on 21 March was the culmination of a course of conduct. He was calm when he first went into Mr Ogg's office and sat down. The catalyst for his anger was when Mr Ogg told him that his proposed salary increases for his son Mark and Yvonne Gibb would not be agreed. To put it colloquially the claimant *"lost it".* Mr Ogg said in evidence that, *" he very quickly changed from having an amicable conversation. It went from one extreme to another".* He said that the claimant was *"raging….it was quite an explosive departure".*

78. What then of the *"special circumstances"* ? The respondent's Directors must have been aware of how strongly the claimant felt and that he had already advised his son Mark and Yvonne Gibb that they would get increases over and above the general rate. The claimant became very angry indeed as soon as Mr Ogg told him that he and Mr Rastall had decided not to award the extra pay increases to them. This not only angered the claimant but having advised his son and Yvonne Gibb that they would get the increases, understandably it was also a source of

considerable embarrassment to him. He said that what Mr Ogg told him was, *"the straw that broke the camel's back".* He then acted, *"on the spur of the moment".* He had been calm when he went into Mr Ogg's office and sat down. What he said and did was an angry, emotional outburst. He was suffering from stress not just at work but also at home with added responsibilities there due to his wife's leg break and immobility. He was signed off work the following day with stress by his GP.

79. Further, the claimant, Mr Ogg and Mr Rastall had been in business together for some 30 years. The claimant was the Managing Director and he was required in terms of the company's Articles of Association to give notice of his resignation as a Director. It would be normal practice for someone in a senior position to resign by giving written notice.

80. I arrived at the view, therefore, that there were "special circumstances" in the present case.

81. The EAT in ***Kwik-Fit*** said that where such special circumstances exist such as *"words spoken and actions expressed in temper"*, apparently unambiguous words can be considered in the light of the surrounding circumstances and it may be unreasonable and risky for an employer to assume a resignation and to accept it forthwith. In such cases, the EAT added, a prudent employer will allow a reasonable period of time to elapse before accepting a supposed resignation. If, during this period, facts arise which require further investigation, an employer who does not investigate will risk the Tribunal drawing an inference of "dismissal" from the evidence. The length of time that it is reasonable for a prudent employer to wait before accepting a proposed supposed resignation is a question of fact for the Tribunal. However, the EAT said that that the appropriate period was, *"likely to be a day or two".*

82. The respondent's solicitor submitted that it was *"highly significant"* that the claimant made no attempt to contact his fellow Directors later in the day after he left the office and that he did not report for work the next day. I do not agree. It was clear that the claimant was in no fit state to do so.

83. The claimant had worked with his two fellow Directors for almost thirty years. They were aware of how strongly he felt about the salary increases. It was clear that he was very angry when he said and acted the way he did on 21 March. He was not acting rationally. Further, in my view, "facts" did arise as soon as the following morning when the claimant made it abundantly clear that he had not intended to resign; he had only behaved the way he did *"in the heat of the moment"* as he was very angry and suffering from stress both at work and at home; he had consulted his Doctor and been signed off with *"stress at work"*; and he wanted to take time off and return to work as soon as he was fit to do so.

84. However, for whatever reason, it was clear that there was considerable ill feeling towards the claimant, on the part of Mr Rastall in particular. That was abundantly clear from his comment when the claimant left the offices on 21 March. In their desire to rid themselves of the claimant, Mr Rastall and Mr Ogg seized upon what he said and did on 21 March. At no time did they ever contemplate considering whether the claimant had really meant to resign, even when they became aware the following day of the state of the claimant's health. They were not prepared to countenance anything other than that the claimant had resigned and would not be allowed to return to work. Within a very short period after the claimant had left the office on 21 March, Mr Rastall had advised the claimant's son that his father had resigned and shortly thereafter there was an announcement to all the staff. Mr Rastall and Mr Ogg then hurriedly convened a Board meeting that afternoon to record that the claimant had resigned and that his resignation had been accepted (P15). This was markedly different from how they had responded previously to an employee intimating his resignation. In the case of Mr Battensby, a Director at the time in 2011, there was a "cooling off" period (P5/1); and in 2019 Graham Barclay's resignation was not accepted immediately by the Directors but rather *"considered very carefully"* (P10/2).

85. There was no obvious reason why it was necessary to convene such a meeting so quickly. The fact that they did, reinforced my view that the Directors were blinkered by an overwhelming desire to ensure that the claimant would not be allowed to

return to work, in any circumstances, and that no explanation whatsoever from him for his conduct, even though it was unprecedented, in some thirty years, would be accepted. Indeed, when he gave evidence at the Tribunal Hearing Mr Rastall said that he was happy that the claimant had gone. That was why the following day, although the claimant had been signed off work by his Doctor, he rejected out of hand the claimant's explanation that what he had said and done was, *"in the heat* of the moment" because he was angry and stressed and that he had been signed off by his Doctor. Mr Rastall's curt response was that he would *"see him in Court".* This seems strange behaviour for someone who had worked with the claimant for so long.

86. Mindful of the exceptional nature of *"special circumstances"*, and that the claimant was not an immature, inexperienced employee, it was with some hesitation that I arrived at the view that there existed in the present case the sort of *"special circumstances"* identified in ***Sothern***. In the context of the exchanges between the claimant, Mr Ogg, in particular, and Mr Rastall on 21 March, which the respondent relied upon exclusively, the claimant's apparently unambiguous words and actions could not be relied upon. I concluded there was no real resignation despite what might have appeared at first sight. In light of the *special circumstances*, it was unreasonable for the respondent to assume a resignation and accept it forthwith. Further, the respondent refused to even consider the claimant's explanation for the way he had behaved and representations which he made within a reasonable period of time, early the following morning.

Unfair dismissal

87. I accepted the submissions by the claimant's solicitor that the respondent's communications after treating the claimant as having resigned amounted to a dismissal. Indeed, he was not allowed to return to work and Mr Ogg sent him his P45. No fair reason was advanced by the respondent for the dismissal as they were required to do in terms of s.98(1) of the Employment Rights Act 1996. Accordingly, the claimant was unfairly dismissed.

Remedy

88. I invite the parties, in the first instance, to endeavour to reach agreement on the appropriate remedy extra-judicially. Should they fail to do so, a Remedy Hearing will be arranged.

Employment Judge:	**Nicol Hosie**
Date of Judgment:	**29 January 2020**
Date sent to parties:	**30 January 2020**