EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bartlett**

Respondent: **W & H Motors**

Heard at: London South Croydon

On: **17 & 18 March 2022**

Before: Employment Judge Atkins (sitting alone)

Representation

Claimant: Ms C Gannon
Respondent: Mr N Baldock, Counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The Claimant was unfairly dismissed by the Respondent on 6 April 2020.

2. The Respondent was in breach of contract by dismissing the Claimant without the full period of notice to which he was entitled and the employer pension contributions which were due to be paid during that period.

3. A half day Remedy Hearing will be listed, unless the parties inform the Tribunal within 4 weeks of this judgement being sent to them that no such hearing is required.

REASONS

Claims and Issues

1. The Claimant claims that he was unfairly dismissed by the Respondent in a letter dated 6 April 2020. The Claimant also claims that he was dismissed without payment in lieu of notice, or employers pension contributions during

the notice period, and this amounted to a breach of contract or an unlawful deduction from his pay. The Claimant does not claim any consequential financial loss but does claim interest on monies he says are due to him.

2. The Claimant had ticked the box on the claim form to say that he was claiming "other payments", described as "would not furlough", but Ms Gannon clarified at the hearing that the claims listed above were the only ones the Claimant sought to make.

3. The Respondent's position is that the Claimant resigned his employment on 24 March 2020, by telling his employer in clear and unambiguous words that he was leaving his employment, and so he was neither unfairly dismissed nor entitled to any notice pay.

4. Employment Judge Aspinall made a case management order on 30 November 2021 which identified the issues in the claim.

5. At the start of the hearing, it was apparent that the list of issues had narrowed. Mr Baldock for the Respondent accepted that the Claimant was an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996. The Respondent also accepted that if the Claimant was dismissed, the complaint of unfair dismissal was made within time. If he instead resigned, the claim would fall away and so time would cease to be an issue.

6. At the end of the hearing, I indicated that I would not hear submissions on remedy, and the issue of remedy (if remedy became an issue as a result of my judgment on liability) would be dealt with separately.

7. The issues which remained for me to decide are:

<u>Unfair dismissal</u>

1.1 Was the Claimant dismissed?
1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?
1.3 Was it a potentially fair reason?
1.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

<u>Wrongful dismissal/notice pay</u>

2.1 What was the Claimant's notice period?
2.2 Was the Claimant paid for that notice period?
2.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

<u>Breach of Contract</u>

3.1 Did the claim arise, or was it outstanding when the Claimant's employment ended?
3.2 Did the Respondent fail to pay notice pay to the Claimant?
3.3 Was that a breach of contract?

8. The Claimant and Respondent were in agreement that the key issue in this case is whether or not the Claimant terminated his employment with the Respondent on 24 March 2020. All other matters flow from that issue.

Procedure, documents, and evidence heard

9. There were two bundles. The first was a bundle containing 16 witness statements paginated to 44 pages. The second was a bundle of documents paginated to 191 pages. The bundles were accompanied by a cast list, a key document list, and a chronology. The Respondent made written opening submissions. The Claimant gave evidence. The following witnesses gave evidence on behalf of the Respondent:
   (a) Mr Yorkston, Coach Manager and the Claimant's line manager;
   (b) Mr Nixon, Accounts Manager;
   (c) Mr Smallwood, General Manager;
   (d) Mr Heron, owner and Managing Director;
   (e) Ms Shaw, coach driver; and
   (f) Ms Adams, coach driver and receptionist.

10. In making this decision, I have taken account of all of the evidence before me, even if I have not mentioned any specific part of it.

Fact findings

11. The Claimant was employed by the Respondent as a coach driver. The Claimant worked as a driver on the 'air side', working inside Gatwick airport to drive people between various sites at the airport and to and from planes. He required, and had, an air side licence to do so.

12. The Claimant had a written statement of the terms and conditions of his employment, dated 7 February 2018, and saying (so far as is relevant):

    "*Relevant Dates of Employment*
    Your employment commenced on 8th June 1998. This change is effective from 4th January 2018. There is no other period of employment that counts toward your continuous employment with [the Respondent].

    …

    Remuneration
    You will be paid at an hourly rate of £9.00

    …

    Hours of work
    Your hours of work are to cover airside manoeuvres on 4 days on, 4 days off basis. Hours of work will be 0600 to 1400 being 8 hours work. Winter and Summer to be worked in accordance with operational requirements. There is no guaranteed minimum number of hours.

    …

    Notice periods

Should either party wish to terminate employment, notice should be given in writing to the other party. The amount of notice that either party is required to give is set out below.

Notice by the [Respondent]	*Length of Employment*
…	
12+ years	*12 weeks*
Notice by the [Claimant]	
Length of Employment	*Notice period*
…	
More than one month	*One week.*"

13. The Claimant says that when he reached the age of 65 he asked to move from a full time role to a 4 days on, 4 days off, pattern.

14. Mr Yorkston would allocate work to the Claimant on a day to day basis. The Claimant did not have guaranteed hours of work on the days he was 'on'. Mr Yorkston would call the Claimant and tell him when his hours of work were to start when he was 'on'. The Claimant would then record the hours he worked on a card and submit it. At the end of the week the hours recorded by the Claimant would be checked, the total pay due would be calculated, and the total pay due would then be transferred to the Claimant's bank account at the end of the week. The Claimant would also receive a weekly pay slip. The Claimant received a holiday allowance of 20 days pro rated to a full time positon (including bank holidays).

15. The Claimant can recall discussing retirement with Mr Heron. The Claimant says that Mr Heron would ask him if he wanted to retire, and he would say no, not yet. Mr Heron says that the Claimant would tell him he was thinking of retiring at some point. Mr Smallwood also recalls discussing the potential for retirement with the Claimant. Mr Shaw also recalls the Claimant telling her that he was thinking about retirement.

<u>The events of 24 March 2020</u>

16. There is a dispute as to whether the Claimant spoke to Mr Yorkston at the beginning of his shift. The Claimant says that he did. Mr Yorkston says that he did not. I do not think that anything turns on this issue. If it happened, nothing was said at it that goes in any way towards the key issue in the claim. It is therefore not necessary for me to make any findings about this alleged meeting.

17. There is also a dispute as to whether or not Mr Yorkston told the Claimant about a meeting to discuss the COVID situation on 27 March 2020. The Claimant says that Mr Yorkston did. This is supported by the evidence of Mr Ketchell. Mr Yorkston says he did not. In any case, this dispute does not go in any way towards the key issue in the claim. It is therefore not necessary for me to make any findings about what was said about any meeting on 27 March 2020.

18. The Claimant entered the Respondent's Office in the late morning of 24 March 2020. He spoke to Mr Yorkston. Mr Smallwood was also in the office, at his desk. Peter Ketchell was present. There is a dispute as to whether

Ms Shaw was also present. There is also a dispute as to what exactly was said.

19. It is common ground that the Claimant told Mr Yorkston at some point on 24 March 2020 that at the end of his shift that day, was going to start self-isolating with his wife, who was in a vulnerable category and shielding.

20. This statement should be viewed in the context of when it was made. The conversation took place at the very start of the first COVID-19 lockdown. Before that lockdown was put in place there was intense public speculation about COVID-19 and the public health measures necessary to combat the virus. Previously, on 12 March 2020, the Government had also advised people who fell into vulnerable categories to self-isolate. On 16 March 2020, the Government had asked people to avoid non-essential contact and travel. On 23 March 2020, the previous day, the Prime Minister had asked people to stay at home. The details of the furlough scheme had not yet been settled.

21. The Claimant's evidence is that at the end of the meeting he said "that's it, see you soon", as he left the office. These were the words he usually used when leaving at the end of a 4 day shift. He did not say that he was going to "call it a day".

22. Mr Yorkston and Mr Smallwood's evidence is that that the Claimant said at the end of the meeting that he was going to "call it a day", as he was in the process of leaving the office. Ms Adams said that she overheard these words from the next room. None of these three witnesses could recall the Claimant saying "that's it, see you soon". Ms Adams was in the next room. She heard the Claimant say the words "call it a day".

23. It is accepted that Peter Ketchell was present. Mr Ketchell has provided a witness statement and an affidavit dated 26 March 2021. Mr Ketchell could not attend the Tribunal to give evidence as he has sadly passed away. Mr Ketchell did not state in his witness statement or his affidavit what words the Claimant had used, and so his evidence does not help me determine what was said.

24. Ms Shaw was adamant that she was not present. She was unable to say what the Claimant had said at the end of the meeting. It follows that her evidence does not able to help me determine what was said.

25. I find that it is more likely than not that the Claimant did say that he was going to "call it a day". Four witnesses recall him doing so. Their account has been consistent since they made their first statements.

26. Mr Yorkston then told Mr Heron about the conversation. Mr Yorkston says that a discussion then took place between Mr Heron, Mr Smallwood, and Mr Yorkston after the Claimant left the office.

27. Mr Yorkston said that he did not form a view on 24 March 2020 as to whether the Claimant had retired, and did not communicate any views about this issue. I note the evidence of Mr Smallwood, who said in his statement of 21 January 2022 and during his oral evidence that when he heard the words

"call it a day", he came to the conclusion that the Claimant was retiring. That was Mr Smallwood's interpretation of the words. Both Mr Nixon and Mr Heron say that they were informed that the Claimant had retired. I find that this was because Mr Smallwood had told them so, on the basis of the conclusion that he had formed.

28. Mr Heron says that after he had been informed that the Claimant was leaving, he came into the office and spoke with the Claimant, and the Claimant confirmed to Mr Heron that he was retiring (leaving his employment). The Claimant denies this happened.

29. I find that this alleged conversation between Mr Heron and the Claimant on 24 March 2020 did not happen, because:
    (a) Mr Heron records in his statements of 16 December 2020 and 21 January 2022 that the conversation took place in the office with the Claimant, Mr Yorkston, and other members of staff.
    (b) However, neither Mr Yorkston nor Mr Smallwood record this meeting as taking place in their statements of 2 and 3 December 2020 respectively, or their statements of 22 January 2022. Mr Smallwood only says in his second statement that it is "his understanding" that the meeting took place. He does not say that it did, or that he saw it happen.
    (c) Giving evidence at the hearing, neither Mr Yorkston nor Mr Smallwood could recall Mr Heron being in the office talking to the Claimant.
    (d) This was a small office, consisting of two small linked rooms., yet nobody but Mr Heron was able to say that they saw or heard it happening.
    (e) It is inconsistent with the record of the meeting of 27 March 2020, which I will come to.

<u>The meeting of 27 March 2020</u>

30. On the 27 March 2020 a management meeting was held. The minutes of this meeting were prepared by Mr Nixon. They confirm that the meeting was attended by Mr Heron, Mr Smallwood, Mr Yorkston and Mr Nixon. The relevant part of the minutes says:

    "*After discussion it was agreed that with the exception of Andy* [Yorkston] *and* [the Claimant] *the Coach department would be furloughed with immediate effect. The staff to receive 100% of their basic pay.*
    …
    [The Claimant's] *position is unclear as he decided to call it a day but we await his letter of resignation*."

31. When asked why the Claimant's position was "unclear":
    (a) Mr Nixon said that there was a general impression that the Claimant had retired but he had not yet submitted a written notice of resignation and was expected to do so. He said that the Claimant "had left, but he had not resigned."
    (b) Mr Yorkston was unable to explain it (he thought that the Claimant had resigned and that the position was clear).
    (c) Mr Smallwood said the position was unclear because the Claimant had not given his written notice or submitted a self isolation certificate, and no final decision about his position was made.

(d) Mr Heron said that the position was unclear because it was still being finalised.

32. I note that this record directly contradicts Mr Heron's claim to have spoken with the Claimant on the 24 March 2020 and confirmed that the Claimant was retiring. If that had been the case, there would have been no uncertainty and the minutes would have stated that the Claimant had retired. The minutes, prepared at the time, and the oral evidence was clear that there was some considerable uncertainty about the Claimant's position.

33. On the basis of the evidence, I find that at the time the Respondent's officials were uncertain about whether the Claimant had resigned his employment or not. This is unsurprising in light of the ambiguous nature of his saying that he would "call it a day" without any clarity as to what "it" meant. They were waiting for a formal confirmation from him to make the matter clear. This also explains why the Claimant was referred to, by name, as a driver who had not been furloughed. The Respondent clearly needed to know his position before they could make a decision about whether he would be furloughed or not.

34. Mr Yorkston was asked why he did not call the Claimant to clarify the position of uncertainty. He confirmed that it may have been sensible to have done so, and that he could have done so. He said that he did not do so because he was very busy making arrangements to furlough other drivers. I do not accept this explanation. In addition to the phone calls Mr Yorkston was making to other drivers, it would have been very easy to have made one more to the Claimant. There was no reason why Mr Smallwood, Mr Nixon or Mr Heron could not have made that telephone call either.

35. At some point after this, the Respondent's position hardened. I come to this below.

36. There is one further issue, of whether the Claimant was likely to have been furloughed if there was no issue about his potential resignation.

37. Mr Yorkston says that he was not, as the Claimant held an air side pass and so would have been retained to carry out air side work. However, Mr Yorkston also confirmed:
    (a) That of seven drivers placed on furlough, three also held an air side pass.
    (b) That he and another air side driver were retained on active service.
    (c) That he could call on two other employees, also in active service, who had air side passes.
    (d) That the combination of two active drivers and two reserves were sufficient to carry out the work that remained.

38. Given that the Respondent had enough air side drivers to carry out the remaining air side work without the Claimant, I see no reason why the Claimant would not have been placed on furlough had his continuing employment status been clear. No evidence was placed before me that the Claimant would have been selected to remain active in preference of either Mr Yorkston or the other air side driver who was to remain active.

39. Mr Smallwood said that because the Claimant had a lorry licence in addition to an air side pass, he would have been retained in active service. However, Mr Smallwood also said that the two active air side drivers, and one of the reserves, also had a lorry licence. It is clear, in light of this and Mr Yorkston's evidence that there was enough capacity to cover the remaining work, this is not a sufficient reason to conclude that the Claimant would not have been placed on furlough had his continuing employment status been clear.

40. I accordingly find that, has the Claimant's status not been in issue, he would have been furloughed with immediate effect following the meeting of 27 March 2020.

41. I note from the minutes of the 27 March 2020 that the furloughed drivers were to be placed on 100% pay. I do not know if, or for how long, that continued to be the arrangement.

The letter of 6 April 2020

42. It is unclear when the Respondent took the position that the Claimant had, in fact, retired.

43. Mr Yorkston says that he did not make that decision, but that it was made by senior managers. Mr Heron said that it was made by himself, Mr Smallwood, and Mr Nixon. Mr Nixon said that it was made by the Respondent as a corporate entity. No witness was able to say when this decision was made.

44. Mr Nixon wrote a letter dated 6 April 2020. Mr Yorkston and Mr Smallwood both said that they did not discuss the letter with Mr Nixon. Mr Nixon said that he would have discussed the letter with Mr Heron before it was sent. Mr Heron denied that he discussed the letter with Mr Nixon. I have treated Mr Heron's evidence with some caution. In addition to his claim about having spoken to the Claimant on 24 March 2020, which I have found did not in fact happen, Mr Heron when giving his evidence seemed uneasy and was anxious to minimise his own role in events. The Claimant's status was unclear and the subject of general discussion. It would be unlikely for Mr Nixon to have acted on his own initiative given the seriousness of the issue and the lack of clarity around it. I find that Mr Nixon would have spoken to Mr Heron before sending the letter and so Mr Heron was aware of it.

45. The letter stated, so far as it was relevant:

> "*There would appear to be a misunderstanding on your part regarding your continued employment at W & H Motors…*
>
> *On Tuesday 24th March you left the company premises at 11.00am having said to Andy Yorkston that due to your wife's continuing ill health you were going to call it a day, this conversation having also been verified by George Heron.*
>
> *Given these circumstances we processed your last pay for the week ending 29th March 2020.*

Would you please therefore return your PPE, telephoner, and keys to the premises.

If you would like to discuss this matter further please call either Gary Smallwood or George Heron."

46. The letter was sent by recorded delivery to the Claimant, who received it on 7 April 2020.

47. Notwithstanding the offer of further discussions, it is impossible to read this letter as anything other than a termination of employment. The reference to "final pay" and the request for the return of company equipment would leave any reader in no doubt that employment could not be regarded as continuing beyond this point.

Events following the letter of 6 April 2020

48. The Claimant, upon receiving the letter of 6 April 2020, called the Respondent on 7 April 2020 to confirm that he had not resigned or retired. The Claimant says that he spoke to Mr Yorskston, and then with Mr Nixon. Mr Yorkston denies that he received a call on that day. Mr Smallwood says that he took that call. Mr Nixon can recall speaking to the Claimant on that day. Mr Nixon and Mr Smallwood both recall being told by the Claimant that he had not resigned or retired.

49. Regardless of who took calls from the Claimant on 7 April 2020, it is clear that from this point the Respondent was aware that the Claimant's position was that he had not resigned.

50. Mr Yorkston was furloughed on 13 April 2020.

51. Mr Nixon wrote again to the Claimant on 14 April 2020. The letter refers to the issue of furlough. The letter repeats the points made in the letter of 6 April, that the Claimant's "*last wages payments were for the weeks ending 29th March 2020*" and requesting the return of company property.

52. The Claimant sent an email on 27 April 2020 setting out what he had said to Mr Yorkston on the 24 March 2020.

53. Mr Nixon called Mr Yorkston at some point and asked for his version of the events of 24 March 2020. Mr Yorkston gave his version in an email dated 4 May 2020. He also said that he had not spoken to the Claimant about furlough on 24 March 2020, as no decision had yet been made.

54. On 5 May 2020 Mr Nixon wrote again to the Claimant. He said that at no time was the issue of furlough discussed with the Claimant and saying that the Claimant "*left the office at 1.000 after saying to both Andy Yorkston and George Heron that you were going to call it a day, the interpretation being that you were leaving the Company*" The letter offered a further discussion with Mr Smallwood or Mr Heron.

55. On 11 May 2020 the Claimant responded, claiming that he did not say he was going to resign or retire, his comments related only to the end of his

shift, and that if he had intended to resign, he would have given a week's notice in writing (the requirement of his contract of employment).

56. Mr Nixon replied on 18 May 2020, saying that Mr Heron and Mr Yorkston were of "*the opinion that it was your clear intention to leave W & H Motors on the 24th March 2020 and not return. If you wish to appeal this decision please call Garry Smallwood in writing.*" It repeated the request for the return of company property.

57. On 25 May 2020 the Clamant requested Mr Smallwood to reconsider his decision.

58. Mr Smallwood said that he had called the Claimant on 27 May 2020, as a response to the appeal, and said that he could return to the Respondent's employment. Mr Smallwood's position on this was that he offered the Claimant his old job back. Mr Smallwood said that the Claimant did not want to come back to work, he just wanted to be furloughed. The Claimant disputes this, and says that he did want to return to work.

59. There is no written offer to the Claimant of reinstatement to accompany the telephone call. On Mr Smallwood's evidence, the offer made over the telephone did not cover the issues of sick pay, continuity of service, or furlough. This is in the context of the Respondent having unilaterally decided that the Claimant had resigned, failing to contact him to clarify what he had meant despite the uncertainty about it, rejecting his explanation of what he had meant once it was offered, and maintaining for two months that his employment was at an end. I find that in these circumstances the Claimant could not reasonably have regarded Mr Smallwood's offer as a good faith offer of reinstatement.

60. I find that the Claimant did want to return to work. That was his evidence, and it was consistent with the evidence or Mr Smallwood – namely that the Cliamnt wished to remain employed by the Respondent (whether or not in active service or on furlough).

61. There is no evidence that any other action was taken in relation to the Claimant's letter of 25 May 2020.

62. On 22 or 23 June 2020 the Claimant indicated over the telephone that he would be seeking advice about taking legal action against the Respondent.

63. On 23 June 2020 Mr Heron wrote to the Claimant to confirm that the Respondent would not enter into any further discussion with the Claimant.

64. The Claimant submitted two self isolation notices, one on HMRC headed paper and one generated by a NHS website. Both contain defects. In the first months of lockdown there was a great deal of confusion about what to do. It would be easy to tick the wrong box or input the wrong data onto a website. No evidence was put before me to explain how these errors came about. I do not give any weight to the errors. All these self isolation notices establish is that the Claimant was intending to self-isolate with his partner after 24 March 2020, as he had said, because she was in a vulnerable category. They do not assist me with the key issue in this claim.

65. The Respondent also suggested that the Claimant would have claimed statutory sick pay during the period of self isolation, and his failure to do so indicates that he did indeed intend to retire. I do not accept that submission. First, the Claimant was not actually sick, he was self-isolating as a precautionary measure. Second, it was not clear at the time, when the first lockdown began, what the rules were on sick pay and self-isolation. Any claim the Claimant would have made would have been speculative. Third, from 7 April 2020 the Respondent was well aware the Claimant's position was that he had not resigned or retired.

66. The Respondent has suggested that the Claimant sought to retract his resignation when he became aware of the potential for being placed on furlough. They point to the references to furlough in the correspondence and in the ET1. However, that does not assist me either. Either the Claimant voluntarily terminated his employment on 24 March 2020 or he did not. As soon as the Claimant became aware that his employment was at an end on receipt of the letter of 6 April 2020, he immediately contested the suggestion that he had resigned or retired on 24 March 2020. That position has never changed.

67. Several witnesses on behalf of the Respondent expressed surprise that the Claimant did not call Mr Heron, a friend of long standing and the owner of the Respondent, to resolve the matter. However, it is a fact that the Claimant did call the Respondent, the Respondent was aware of his position, and the Respondent continued to maintain that the Claimant had retired. Whether or not he called Mr Heron directly does not change this position.

68. The Claimant was never issued with a P45. Mr Nixon said he felt it was not appropriate to do so while the issue was being discussed between the Claimant and Respondent, directly and via ACAS. Mr Nixon said that he probably should have done.

ACAS

69. On 24 June 2020 the Claimant and Respondent entered into discussions at ACAS. Although it would normally be inadmissible, the Respondent has chosen to put forward evidence showing that they made an offer of reinstatement to the Claimant. The Claimant has not objected, and as a result I conclude that both parties have agreed to waive privilege. That offer of reinstatement was said to be on the same terms as his contract of employment dated 7 February 2018.

70. The Claimant's evidence at the hearing was that he rejected that offer on the basis that it was presented to him as a zero hours contract with no continuity of service. I do not accept this. Although I have not been provided with any evidence as to what ACAS said, I see no reason why they would not have conveyed the offer as it was made by the Respondent. It may have been explained badly. The Claimant's contract of employment had said that there was no guaranteed minimum number of hours. This may be the reason why the Claimant saw it as a zero hours contract. However the Claimant's contract of employment did include continuity of service from 8 June 1998. I find that the Claimant was offered by ACAS a chance to take

his old job back on the same terms and conditions, including as to hours of work and continuity of service, and rejected it.

71. On 24 July 2020 ACAS issued an early conciliation certificate. This claim was filed on 17 August 2020.

The law

72. The majority of the Supreme Court in *Société Générale, London Branch v Geys* [2013] IRLR 122 held (at paragraph 57) that it is: "an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate." *Martin v Glynwed Distribution* [1983] IRLR 198 says that the key question is “Who really ended the contract of employment?”

73. Both parties must understand what has taken place. Once notice has been given, both parties should be sure that the employment is going to come to an end on a particular date. The notice must specify the date of termination or at least contain facts from which that date can be ascertained or inferred, per *Mitie Security (London) Ltd v Ibrahim* UKEAT/0067/10.

74. Where dismissal is contested, as it is in this case, the burden of proof is on the Claimant to establish that he was dismissed.

75. The Respondent relies upon *Sovereign House Security Services Ltd v Savage [*1989] IRLR 115, which ruled that unambiguous words of resignation should normally be taken at their face value. The judgment also held that in special circumstances the tribunal would be entitled to decide that there was no resignation, despite appearances to the contrary. In that case unambiguous words of resignation spoken in the heat of the moment did not amount to a resignation.

76. I also note *Kwik-Fit (GB) Ltd v Lineham 1992 ICR 183. The EAT* said that where special circumstances arise, apparently unambiguous words can be considered in the light of the surrounding circumstances so that it may be risky for an employer simply to accept what seems to be a resignation. In such cases, 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.

77. The Respondent submits that the test is how the words would have been understood by a reasonable listener. Provided the reasonable listener would honestly and reasonably construe them as a dismissal or resignation, he or she should be permitted to rely upon that construction even if that was not the intention of the speaker: *East Kent Hospitals University NHS Foundation Trust v Levy* [2018] UKEAT 0232/17.

78. The Respondent also replies upon *Harris & Russell Ltd v Slingsby* [1973] IRLR 221 as authority that a resignation once made cannot be unilaterally withdrawn.

Conclusions

Unfair dismissal

1.1 Was the Claimant dismissed?

79. The Respondent's case is that the Claimant's words on 24th March 2020 were clear and unambiguous. They say that the reasonable listener would have understood the words "call it a day" as a clear and unambiguous statement that the Claimant was leaving the Respondent's employment, with immediate effect.

80. I disagree. These words are not clear or unambiguous, even when taken in the context of the Claimant having previously discussed potential retirement. They could mean a number of things. The Claimant could be referring to his work for the day, the end of his shift, his time at work prior to self-isolating with his wife, or to his employment as a whole. The reasonable listener, even one who was aware of previous conversations about retirement, would not have been sure which one was meant.

81. The ambiguity of these words was expressly recognised by the Respondent at the time. The Claimant's position was said to be 'unclear'. The Claimant's notification of resignation was expected but had not been received. The Claimant had 'left, but not resigned'. The Claimant's position was 'being finalised'. These statements did not come from the Claimant's evidence, all of these statements were made on behalf of the Respondent by the Respondent's witnesses. They show that the Respondent did not consider the Claimant's words to be clear and unambiguous. The question of their being special circumstances accordingly does not arise.

82. I accordingly find that the Claimant did not resign or retire on 24 March 2020.

83. The letter of 6 April 2020 was clear and unambiguous. The Claimant's understanding that he remained employed by the Respondent was said to be incorrect. It told the Claimant that his next pay would be his last pay. It required the Claimant to return company property. It was very clear from that letter that his employment was at an end.

84. I accordingly find that Claimant was dismissed on 6 April 2020.

1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?
1.3 Was it a potentially fair reason?
1.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

85. The Respondent does not seek to argue that the dismissal was fair.

86. The Respondent argues that the Claimant contributed to his dismissal. I reject that argument. It is clear from the evidence that the Respondent chose to treat the Claimant's words as terminating his employment. They made no effort to check with him to clarify the situation. It is unsurprising

that they did not hear from the Claimant after 24 March 2020: he was self-isolating with his partner and the Respondent knew that. There was no reason for the Claimant to call the Respondent. The Respondent unilaterally chose to terminate the Claimant's employment. There was nothing the Claimant could reasonably have done to change the Respondent's mind before his employment was terminated.

87. The Respondent subsequently declined to accept the Claimant's explanation of his words or change their mind about the termination of his employment. Nothing that he could or did do thereafter changed the position.

Wrongful dismissal/notice pay

Wrongful dismissal/notice pay

2.1 What was the Claimant's notice period?

88. The Claimant's notice period was 12 weeks.

2.2 Was the Claimant paid for that notice period?

89. The Claimant was not paid any payment during or in lieu of that notice period.

2.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

90. The Respondent does not argue that the Respondent was entitled to dismiss the Claimant without notice. There was no such serious incident to justify immediate dismissal.

Breach of Contract

3.1 Did the claim arise, or was it outstanding when the Claimant's employment ended?

91. The claim for unpaid notice pay and employer pension contributions arose at the termination of the Claimant's employment.

3.2 Did the Respondent fail to pay notice pay to the Claimant?

92. The Respondent did not pay the Claimant any monies in lieu of notice.

3.3 Was that a breach of contract?

93. That was a breach of contract.

94. The case will now be listed for a half day remedy hearing, unless the parties inform the Tribunal within 4 weeks of this judgement being sent to them that no such hearing is required.

Employment Judge Atkins
11 April 2022

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All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.