

Mind Your Language

Makbool Javaid
Partner
Head of Employment Law



makbool.javaid@smab.co.uk

Ewan Keen
Partner



ewan.keen@smab.co.uk

Dismissing someone is never easy. On the other hand, resigning can bring a mixture of sentiments: happiness, sadness, relief or unease about the boss' reaction that you are off to pastures new. The problem with both situations is that the circumstances can become heated, emotional, or based on misunderstanding.

Whether dismissing or resigning, what is clear from case law is that the circumstances have to be very clear, the words used have to be unambiguous and that once notice is properly served, there is 'no going back' without agreement, as the case of *Willoughby v C F Capital Plc*, reported on Page 3, shows.

The general rule is that if unambiguous words are used in a dismissal: "you are dismissed", or in a resignation: "I am resigning", then they may be taken at their face value and both will have brought the employment relationship to an end. However, if ambiguous words are used, e.g. "get out", or, "I'm off", then the situation will be analysed to determine whether special circumstances applied as it maybe that there was no intention to dismiss, or resign, and therefore neither has occurred. These circumstances can include 'heat of the moment' situations where dismissal or resignation is retracted almost immediately.

The *Willoughby* case provides an example of the consequences of acting on a misapprehension. It confirms that if notice is properly served in accordance with the contract and the wording expresses a clear intention to bring the employment relationship to an end on a specified date, then there are no special circumstances that apply and the notice cannot be withdrawn without the other party's consent. Furthermore, where a dismissal represents a repudiatory breach of a fundamental term of the contract, e.g. there are no grounds for termination, an employer is not able to 'right the wrong'. A breach cannot be remedied after the event unless the employee decides to treat it as never having occurred.

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Employment tribunal claims up by 56%

The Annual Statistics Report 2009/10, published by The Tribunals Service shows a substantial increase in the number of employment tribunals claims compared to 2009/9, with the total number increasing by 56% and the highest individual jurisdiction claim, breaches of working time rules, up by 296%.

The [Annual Statistics Report](#) covers the period 1 April 2009 to 31 March 2010 and shows a substantial number of increases in cases with the suggestion that these are due to the recession and a rise in the number of 'class action' multiple claims arising out of the same matter. The Report reveals the following:

- The number of employment tribunal claims received was 236,100 in 2009/10, an increase of 56% on 2008/09.
- The number of jurisdictional complaints contained within those claims (one claim can cover more than one jurisdiction) amounted to 392,800, an increase of 47% on 2008/09.
- The top 3 jurisdictional claims were as follows (last year's figures in brackets): (1) Working Time Regulations = 95,200 (24,000) + 296%; (2) Unauthorised deductions from wages = 75,500 (33,800) + 123%; and (3) Unfair dismissal = 57,400 (52,700) + 8.9%.
- The employment tribunal service failed to meet its target of listing 75% of single accepted cases for a hearing within 26 weeks of receipt: it managed 65%, down on the previous year's achievement of 74%.
- 87% of appeals were listed for a first hearing in the EAT within 26 weeks of registration, which was 12% better than its performance target of 75%.

"The number of employment tribunal claims was 236,100 in 2009/10, an increase of 56% on 2008/09."

Flexible working incentives to reduce commuting

In an interview with the Daily Telegraph, transport minister, Norman Baker, has confirmed that the Department of Transport is looking into a number of initiatives aimed at changing traditional work travel patterns including introducing incentives to encourage flexible working arrangements, such as allowing employees to work one day at home per fortnight.

In its Coalition agreement policy document, the Government stated that it wishes to extend the right to request flexible working to all employees. In an interview given to the Daily Telegraph, transport minister, Norman Baker, confirmed that he is now looking into a number of initiatives aimed at changing traditional work travel patterns, thereby reducing and carbon emissions and improving quality of life, which include:



- introducing incentives to encourage flexible working arrangements, such as allowing employees to work one day at home per fortnight;
- encouraging people not to travel, or to travel at different times, and to use technology to communicate;
- looking to Whitehall to set an example by reducing their travel, through increased use of video conferencing;
- encouraging train companies to review how tickets are sold, for example by selling carnets as well as season tickets.

Guidance from Acas on managing employee performance

Acas has released new guidance to assist businesses to develop an engaged workforce through effective performance management which contributes to the achievement of business objectives and the development of employees' skills.

Acas considers that good performance management benefits businesses by enabling them to achieve their business objectives, improve employee engagement and develop employees' skills. From an employee perspective, the benefits of good performance management include: (i) a clear understanding of where they fit into the business; and (ii) their role in achieving the business's objectives through a greater understanding of the competences needed.

The new Acas guide, '[How to manage performance](#)' covers: (i) the importance of managing employees' performance; (ii) how to introduce and develop a performance management programme; (iii) how to plan employees' performance and development; (iii) how to review an employee's performance and development; (iv) the effect of linking rewards to performance; and (v) managing under performance. The guidance also contains a sample performance record and an example of a competency framework.

"Good performance management benefits an employer by enabling the achievement of business objectives, improving employee engagement and developing skills"

Unambiguous words leading to dismissal mean what they say

In *Willoughby v C F Capital Plc*, the EAT held that unambiguous words leading to dismissal mean what they say. It must be assumed that the words represent a rational conscious decision unless the circumstances indicate the contrary, e.g. a 'heat of the moment' dismissal quickly retracted. Once clear words of dismissal are used, the position cannot be reversed unless the employee agrees.

During the banking crisis, CFCap contemplated moving employees to self-employed status. Miss Willoughby expressed an interest during a meeting with her manager, Mr Keeley, but did not agree to the change, albeit that Mr Keeley believed that she had. Three weeks later, Miss Willoughby received a letter terminating her employment on 31 December. A service agreement was enclosed for self-employed work. She complained that she had been dismissed when there were no grounds for doing so. Mr Keeley offered to withdraw the dismissal. Having previously taken legal advice, Miss Willoughby did not accept. A tribunal rejected her unfair and wrongful dismissal claims holding that the dismissal was withdrawn as soon as practicable and in the circumstances, she had resigned.



The EAT upheld Miss Willoughby's appeal. Unambiguous words leading to dismissal mean what they say. The assumption can only be that the words used represent a rational conscious decision unless the circumstances indicate the contrary, such as a 'heat of the moment' dismissal, which is retracted very quickly. The letter to Miss Willoughby suggested the dismissal was intentional and she was entitled to take the wording at face value. In addition, the employer had taken some time before trying to resolve the matter. The Xmas/New Year holiday period was not an excuse for their delay. Once clear words of dismissal are used, including where they represent a fundamental repudiatory breach of contract, the position cannot be reversed unless the employee agrees. Miss Willoughby had been dismissed and her claims would be heard by a fresh tribunal.

New NMW rates confirmed

The Government has confirmed that the national minimum wage increases and the decrease in the age at which the adult rate becomes payable from 22 to 21, as proposed by the previous Labour government in the March 2010 Budget, will take effect in October 2010.

Under the National Minimum Wage Regulations 1999 (Amendment) Regulations 2010, the new rates, which will come into force on 1st October 2010, are as follows: (i) £5.93 per hour for those aged 21 (see below) and over (a 2.2% increase on the current £5.80 rate); (ii) £4.92 per hour for 18-20 year olds (a 1.9% increase on the current £4.83 rate); and (iii) £3.64 per hour for 16-17 year olds (a 2% increase on the current £3.57 rate).

Regulation 5 decreases the age at which adult rate becomes payable from 22 to 21. Regulation 6 amends the per day value of the living accommodation amount, increasing it from £4.51 to £4.61 for each day that accommodation is provided.

The Government has also extended the remit of the Low Pay Commission for its 2011 report, by requiring the Commission to pay particular attention to the competitiveness of small firms and the employment prospects of young people.

"The adult NMW rate will be £5.93 per hour for those aged 21 and over from 1 October 2010, a 2.2% increase on the current rate of £5.80"

Effective date of termination cannot be changed by agreement

In *Wedgewood v Minstergate Hull Ltd*, the EAT held that if an employee is given notice of dismissal expiring on a certain date, the fact that the employer later agrees that the employee need not work to the end of the notice period does not change the "effective date of termination" (EDT) for purposes of calculating the start of the 3 month period allowed for bringing an unfair dismissal claim.

Mr Wedgewood was notified that he would be dismissed by reason of redundancy on 1st December 2008, the effective date of termination (EDT). He subsequently asked his employer whether he could leave earlier, i.e. on 26th November. An agreement was reached that while he would be paid up until the end of his notice period, Mr Wedgewood would not be required to attend work after 26th November other than for a handover meeting. Mr Wedgewood's unfair dismissal claim was presented on 28th February 2009, which was just within the required 3 month period of the 1st December 2008. But an employment judge decided that the agreement had brought the EDT forward from 1st December to 26th November and the claim was out of time.



Mr Wedgewood's appeal to the EAT was upheld. The employment judge had relied on *Palfrey v Transco plc* [2004] IRLR 916, which held that where an employer agrees to an earlier leaving date and pays the outstanding notice in lieu, this is a withdrawal of the original notice of dismissal, and the substitution, by way of a fresh notice, of a shorter period, thereby meaning that the EDT is brought forward. In this case, however, while the agreement released Mr Wedgewood from having to attend work after 26 November, it confirmed that he would continue to be paid up until 1 December. This meant that the EDT had not changed at all. Mr Wedgewood's claim was therefore in time and could proceed to a full hearing.