October 2011

Review

Employment

NO WAY BACK AFTER PREMATURE DISMISSAL LETTER

In the vast majority of cases it should be obvious whether an employee has been dismissed or resigned. But sometimes what looks like a dismissal is not and what appears to be a resignation is treated as a dismissal. In ***CF Capital Plc v Willoughby*** the Court of Appeal was quite clear that an employee had been dismissed, even though it was the result of a genuine misunderstanding on the part of the employer and even though the notice was retracted almost immediately.

On 1 December 2008 Ms Willoughby's line manager, K, told her that due to the difficult economic conditions CF was considering making redundancies, but that these might be avoidable if the sales staff became self-employed agents. W expressed an interest in this, but said that she would need further information about the tax implications of such a change before making a final decision. At that stage no decision to dismiss had been made. Following their meeting W chased K on several occasions for that further information and was told that it would be sent to her "soon". Instead, on 22 December K wrote to W enclosing a copy of the proposed agency agreement for her to sign based on what the letter said was their "mutual agreement". It stated that "the termination of your existing contract will be effective from 31 December 2008" and that their working relationship would continue by her becoming self-employed.

Upon receipt of the letter W sought legal advice and in early January 2009 she informed CF that she did not accept the agency agreement and was treating herself as dismissed with effect from 31 December 2008, as per K's letter. Perhaps realising that he had been a little premature, or perhaps too definite, K assured W on 5 and 6 January that there had been a misunderstanding and that there was never any intention to simply terminate her employment. He informed her repeatedly that if she did not want to become self-employed she should simply return to work as an employee as before. W did not return and subsequently brought claims of wrongful and unfair dismissal in the Employment Tribunal. CF denied that W had been dismissed and argued that she had effectively resigned when she refused to return to work.

The Employment Tribunal agreed that "without more" K's letter of 22 December did amount to an express dismissal. However, it accepted CF's arguments that there were "special circumstances" that had to be taken into account, in particular that CF believed that W had agreed to self-employment and that it had withdrawn the dismissal and offered instant re-employment as soon as it realised its mistake. The Tribunal concluded that in these circumstances W had not been dismissed and she had in fact resigned by refusing to return to work.

This matter went all the way to the Court of Appeal which concluded that CF could not argue that there were "special circumstances" entitling it to withdraw its dismissal. The Court took the opportunity to set out the general principles that Tribunals should take into account when deciding whether an employer's words or actions amount to a dismissal:

- As a general rule, if an employer or employee gives notice of dismissal or resignation they will be treated as meaning what they say. In this case, for example, CF's letter of 22 December made it quite clear that it was terminating W's employment on 31 December 2008. Once such notice has been given it cannot generally be withdrawn, except by consent between the parties.

- There are, however, "special circumstances" in which the Courts accept that the recipient of a dismissal/resignation notice should be required to treat it with caution and to take steps to satisfy itself that the giver of the notice really intended to terminate the employment relationship. By definition this should only happen in very limited circumstances and would include, for example, where words are uttered in the heat of the moment or where the employee is immature or has been "jostled" into a decision by the employer. In this case, CF argued that in light of the conversation that had taken place between W and K on 1 December 2008 it should have been clear to W that CF did not intend to dismiss her if she did not accept the agency terms and that reference to termination in its letter of 22 December must have been a mistake (or at least should have been read as not applying if she did not accept the agency terms). It said that it was not reasonable for W to take the dismissal letter at face value in those unusual circumstances and therefore that once CF realised it had made a mistake it was entitled to withdraw the notice.

- The Court of Appeal disagreed. It said that W was perfectly entitled to treat CF's letter as a dismissal letter. She might have been surprised by the content of the letter, but this did not mean that she was not entitled to treat it at face value. After all, employees might often think that their employer is making a mistake in dismissing them, but they are still generally entitled, in fact obliged, to take a letter or words of dismissal at face value! CF was clearly intending to dismiss W as a matter of law if she accepted the transition to self-employment. Admittedly, it might not have done so had it appreciated that W was not going to accept the offer of self-employment, but this was not sufficiently "special" to entitle it to withdraw the dismissal notice. The Court said that the nature of the exception is "where the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place – that, in effect, his mind was not in tune with his words". What they had here was a situation where the employer clearly had intended to dismiss, but was mistaken in its decision to do so, which is not the same thing at all.

As a general rule, employers will be treated as meaning what they say and as such if they issue notices of dismissal it will be very difficult for them to withdraw them unilaterally, even if there has been a genuine misunderstanding. As a minimum, if the notice of termination is intended to be conditional, as here, that condition should be very clearly stated. The good news is that the same goes for employees, although it is probably fair to say that the Courts have generally shown a greater willingness to accept that employees do not always mean what they say and that in any case of material ambiguity of intention they should be given a chance to revisit their position.

Note: It will be interesting to see what compensation W is awarded for this dismissal. It will clearly be unfair, but surely there is a strong argument that in turning down her employer's immediate apology and offer of reinstatement, she has totally failed to take reasonable steps to mitigate her losses and so should be awarded no compensation. At the very least there should surely be some analysis of why she turned it down.

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