Employment and Discrimination Tribunal

Form ET3

Case No ED014/22

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Christian Keith LE PAGE**
Represented by: Mr. De Lange

Respondent: **Guernsey Freight Services Limited**
Represented by: Advocate Blakeley

Tribunal Members: Advocate J. Hill (Chairman)
Ms A. Rixon
Ms A. Crosland

Decision of the Tribunal

The Tribunal finds that the Applicant resigned from his employment on 30 May 2022. Accordingly, the claim for unfair dismissal fails and is dismissed.

The Tribunal has decided not to exercise its discretion to award costs. Accordingly, there is no order for costs.

.....
Signature of the Chairman

05/03/24
.....
Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.
(Telephone: 01481 220025)
Email: Employmentrelations@gov.gg.

The legislation referred to in this document is as follows:
The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005
The Employment Protection (Recoverable Costs) Order, 2006

The authorities referred to in this document are as follows:
Kwik-Fit (GB) Ltd. v. Lineham [1992] ICR 183
Denham v. United Glass Ltd. [1998] Lexis Citation 714
Sothern v. Franks Charlesly & Co. [1981] WL 186837
Sovereign House Security Services Ltd. v. Savage [1989] WL 650812
Rae v. Wellhead Electrical Supplies Ltd. Case No. 4110014/19
Sindy v. William [2020] HKCFI 2525

Extended Reasons

1.0 Introduction

1.1 Documents within the hearing bundle shall be referred to like this: either "**[x:*y*]**" (which means "page ***x,*** paragraph ***y***"); or "**[*x*]**" (which means simply "page ***x***").

1.2 It is agreed that the Respondent employed the Applicant from 1 September 2020 to 7 June 2022, initially as 'Finance & Administration Manager', and then from 1 January 2022 as 'Finance Director' (see **[68]**). The original contract of employment is at **[99-101]**. The Applicant's relevant earnings are agreed, subject to liability.

1.3 The Applicant complains that he was unfairly dismissed, contrary to s.3 of the Law; after specific questioning by the Tribunal, he confirmed that there was no allegation of constructive dismissal. The Respondent denies that the Applicant was dismissed and, instead, alleges that the Applicant resigned. In the circumstances, the Applicant has the initial burden of proving, on the balance of probabilities, that he was dismissed. If, and only if, he proves that he was dismissed does the burden then shift to the Respondent to prove, again on the balance of probabilities, that the reason for the dismissal was fair.

1.4 The Tribunal, consisting of three members, sat on 15, 16, and 17 January 2024 to hear and determine the Applicant's claim. The Applicant was represented by Mr. De Lange of AFR Advocates, Guernsey; the Respondent by Advocate Blakeley of Blakeley Legal, Jersey. All of the material submitted by the parties in the consolidated bundle and the various skeleton arguments has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

2.0 Background

2.1 The Applicant's claim is based solely upon an allegation of unfair dismissal; it has been specifically pleaded as such (even after amendment of the ET1 on 7 July 2023 – see **[16-18]**) and the Respondent prepared and presented its case on that basis. During the opening phase of the hearing, the Tribunal explored whether there was to be any allegation of constructive dismissal; the Applicant confirmed that there was not. On that basis, the Tribunal decided to put out of its mind anything other than the agreed issue of unfair dismissal and not to speculate about other matters; to do otherwise would have been unfair to the Respondent given the way in which the claim was represented.

2.2 The Tribunal is essentially concerned with matters that started on Friday, 27 May 2022 when, during the morning of that day, the Applicant and Gary Robilliard (the Respondent's managing director) had a "disagreement" in and around various offices within the Respondent's premises. The Applicant and Mr. Robilliard each allege that the other was rude, shouting and aggressive during the course of their encounter. As a result, the Applicant felt upset, left the Respondent's premises and, ultimately, went home for the rest of the day.

2.3 The Applicant returned to work, as normal, on the following Monday, 30 May 2022 and performed his usual duties without any further apparent incident. At about 4.55pm Mr Robilliard approached the Applicant and invited him to discuss the events of the previous Friday morning. The Applicant agreed, and a meeting took place in Mr. Robilliard's office. During the meeting, both the Applicant and Mr. Robilliard clearly expected the other to apologise for what happened the previous Friday. No apologies were forthcoming, and the Applicant returned to his office.

2.4 Later that afternoon the Applicant left his office keys on his desk, removed most of his personal possessions from his office and went back to Mr. Robilliard's office where he gave Mr. Robilliard his identification cards. The Applicant maintains that because of the sensitive and security conscious nature of the business in which the Respondent was engaged, he did not want to be considered as an "insider threat" and so made an express reference to Mr. Robilliard about being put on "gardening leave". He also explained that because of the accusations made during discussions with Mr. Robilliard he wanted to talk to a lawyer.

2.5 There was what the Applicant described as a "third meeting" that afternoon (although it appears to have followed on almost immediately from the second) between the Applicant and Mr. Robilliard, although this time Nick Renouf was called in to join them at the express request of Mr. Robilliard. The Applicant explained to Mr. Renouf that he and the Respondent were "in dispute", that he had been found guilty of misconduct, that he did not think it would be appropriate for him to come into work or have access to the premises while "this is going on", that he was going to speak to a lawyer and that the Respondent should contact its insurer. The Applicant then left and went home.

2.6 The following day, 31 May 2022, Mr. Renouf, on behalf of the Respondent, emailed the Applicant (**[169]**) confirming that "[the Applicant's] *request for Gardening Leave has been granted by* [the Respondent] *and termination of employment as per* [the Applicant's] *contract will be activated*". The email also included this sentence: "*I'm conducting an investigation into the incident that occurred on the morning of Friday 27th May and I would be grateful for a statement of events from you at your earliest convenience*".

2.7 In opening submissions on behalf of the Applicant, Mr. De Lange explained that there were three events leading up to the Applicant's dismissal and that certain wording used by the Respondent would be important. The central question was whether there had been a resignation or a dismissal. Mr. De Lange drew attention to the matters set out in paragraph 5 of his first skeleton argument and encouraged the Tribunal to consider whether there were any "special circumstances" surrounding the Applicant's departure (in particular that no process had been followed by the Respondent and there was a finding of misconduct) to justify negating any suggestion that the Applicant had resigned.

3.0 Evidence Summary

The evidence on behalf of the Applicant

3.1 The Applicant gave evidence on his own behalf (**[39-78]**) and also called Dave Openshaw (**[33-38]**) as a witness.

The Applicant

3.2 The Applicant took the oath and read out his witness statement, taking the opportunity, where necessary, to correct some minor typographical errors. He explained his background with the Respondent and his responsibility for financial and human resource matters within the business. He also explained the importance of aviation security as it applied to the Respondent and its employees. He described how Mr. Robilliard could be volatile and had verbally abused someone in 2021.

3.3 So far as the incident on 27 May 2022 is concerned, the Applicant explained that it arose from Mr. Robilliard alleging that some employees were "swinging the lead" while washing company vehicles and that the Applicant should do something about it. Things quickly escalated and the Applicant alleges that Mr. Robilliard was angry and aggressive towards him. As a result, the Applicant decided to go home for the rest of the day.

3.4 He then told the Tribunal about what happened the following Monday, 30 May 2022. He described arriving as usual at work at 8.30am and exchanging "good mornings" with Mr. Robilliard. He then carried out his normal duties during the day, including reviewing security logs for the previous Friday, Saturday and Sunday, and helping to "screen" airport supplies. At about 4.55pm Mr. Robilliard initiated a discussion about the events of Friday, 27 May. They exchanged fairly frank views, then things rapidly developed, and both the Applicant and Mr. Robilliard expressed a clear expectation that the other should apologise for the events of Friday. Neither the Applicant nor Mr. Robilliard was prepared to do that, and it ended with the Applicant telling Mr. Robilliard that they were "in dispute".

3.5 He returned to his office and quickly became concerned that he had "the keys to the kingdom" (meaning full access to the Respondent's systems and bank accounts); he was worried that false allegations might be made against him if he remained *in poste*. This prompted the second meeting that day, during which he told Mr. Robilliard that he needed to talk to a lawyer and, in reply to Mr. Robilliard asking what the Respondent should do, suggested that he be put on "gardening leave" and that Mr. Robilliard contact the Respondent's insurers. He had already left his business keys on his desk and gave Mr. Robilliard his security ID cards, saying, "*I don't think it is appropriate for me to have these whilst we are in dispute*". He explained that he was very worried about his position generally.

3.6 Almost immediately, Mr. Robilliard told the Applicant that he must repeat his words in front of Nick Renouf (this is the third meeting described above). When Mr. Renouf arrived, the Applicant told him, "*We are in dispute,* [Mr. Robilliard] *has told me I am guilty of misconduct and wants me to apologise to him, I can't because I do not agree with his version of events. That means we are in dispute*". Mr. Renouf said, "*Oh*" and the Applicant said, "*There are my* [security ID] *cards as I don't think it is appropriate for me to come in or have access whilst this is going on. I am going to speak to a lawyer, and I have said to* [Mr. Robilliard] *that he should maybe contact your insurer*". Mr. Renouf replied "*Oh,ok*" and Mr. Robilliard said, "*And he can't speak to me …*". The Applicant said, "*Unfortunately now I guess I have to speak to a lawyer, goodbye*".

3.7 The Applicant did not return to the office, but he described an exchange of text messages with Mr. Renouf shortly after the third meeting on 30 May 2022. The following day, 31 May 2022, the Applicant received the email described above (**[169]**).

3.8 Mr. De Lange asked some supplementary questions dealing largely with the other documents contained in the bundle. The Tribunal has looked at all of those documents and listened with care to all of the supplementary questions.

3.9 Under cross-examination, the Applicant agreed that he was good at his job and took it seriously. He understood "gardening leave" to mean the same as a "payment in lieu of notice" and he regarded the email of 31 May 2022 (**[169]**) to be his dismissal. In all material respects he was consistent with his written statement. In re-examination, he explained that the letter dated 10 June 2022 written by his lawyer (at **[170]**) was in response to the dismissal email. In response to some questions from the Tribunal, he said that the Respondent's Disciplinary Policy contained a process to appeal against disciplinary action (see **[94]**).

Dave OPENSHAW

3.10 Mr. Openshaw made the affirmation and read out his statement (**[33-38]**). At the material time he was Senior Aviation Security Inspector for the Office of the Guernsey Director of Civil Aviation. He explained his background and experience and went on to outline his understanding of regulatory requirements applicable to the Respondent's business. He answered some supplementary questions from Mr. De Lange, was cross-examined and answered some questions from the Tribunal. In summary, he was consistent with his written statement.

The Respondent's evidence

3.11 The witnesses called on behalf of the Respondent were: Steve Le Cheminant (**[121]**), Dave Lawrence (**[88-89]** and **[125-126]**), Nick Renouf (**[84-86]**), Nathan Vidamour (**[119]**) and Gary Robilliard (**[79-83]**).

Steve LE CHEMINANT

3.12 Mr. Le Cheminant made the affirmation and confirmed the contents of his witness summary (**[121]**). He was also asked about his view of Mr. Openshaw. He criticised Mr. Openshaw's style and approach to work, and "answered back" to him. He said that he witnessed the exchanges between Mr. Openshaw and Mr. Robilliard; they were heated, and they shouted at each other. He also witnessed an exchange between Mr. Openshaw and the Applicant during which the Applicant said "bollocks" to Mr. Openshaw a number of times; that was a heated exchange.

3.13 Under cross-examination, he stood by his evidence in chief and did not say anything of any great significance or relevance.

Dave LAWRENCE

3.14 Mr. Lawrence made the affirmation and read out his witness statement (**[88-89]**). He was present in the Respondent's premises on 27 May 2022 and witnessed at least some of what happened between the Applicant and Mr. Robilliard. He explained that he heard Mr. Robilliard shouting at the Applicant, but he could not hear what was being said. When the Applicant walked out of

the office, he heard Mr. Robilliard shouting at the Applicant and telling him to come back in and shut the door; the Applicant shouted back "*No, don't talk to me like a fucking child*" as he walked out.

3.15 Under cross-examination, he said that he didn't hear any of the altercation on Monday, 30 May 2022.

Nick RENOUF

3.16 Mr. Renouf made the affirmation and read out his witness statement (**[84-86]**). He is employed by the Respondent as a Sales & Operations Director and was the author of the email dated 31 May 2022 at **[169]**; it was written to confirm acceptance of the Applicant's resignation. He also responded to some correspondence from the Applicant's lawyer and identified those pieces of correspondence in the bundle. He explained that the Respondent did not regard the Applicant as a threat and had no security concerns.

3.17 He was cross-examined about why, at **[125]**, he had emailed a number of people and asked for their recollection of events between the Applicant and Mr. Robilliard on Friday, 27 May 2022, especially if, as he claimed, he believed that the Applicant had resigned. He explained that he simply wanted to know what had happened, it was not an "investigation" and had nothing to do with disciplinary proceedings. He explained that he was friends with both the Applicant and Mr. Robilliard.

3.18 On 30 May 2022 he was called in to a meeting going on between the Applicant and Mr. Robilliard. He recalled that the Applicant said, "*Gary made my position untenable. He's refused to give me gardening leave*". The Applicant then walked into an adjoining office, said "*There's my keys and ID*" and then words to the effect of "*I'm off*", following which he left. He said that he didn't really understand what "gardening leave" meant, but that by handing back keys and ID that was a clear sign that the Applicant had resigned. He didn't recall the Applicant talking about a "pending investigation", but he thought that the Applicant's actions "screamed resignation". He also confirmed that Mr. Robilliard spoke to the Employment Relations Team on the morning of 31 May 2022. He had no recollection of the third meeting between the Applicant and Mr. Robilliard on 30 May 2022.

Nathan VIDAMOUR

3.19 Mr. Vidamour made the affirmation and confirmed the contents of his witness summary (**[119]**). He went on to explain that the meeting between the Applicant and Mr. Robilliard on Friday, 27 May 2022 was "heated". He was not sure if the Applicant was emotional at the time. He did not hear anything on Monday, 30 May 2022.

Gary ROBILLIARD

3.20 Mr. Robilliard made the affirmation and read out his witness statement (**[79-83]**). He is the managing director of the Respondent and he confirmed the Applicant's background and history of employment. The important parts of his evidence relate to what happened on 30 May 2022. He said that the Applicant refused to apologise for his behaviour the previous Friday, said that his position was "untenable", threatened to contact a lawyer and said that he was placing himself on gardening leave. Following advice from the Employment Relations Service, Mr. Robilliard formed the view that the Applicant's use of the word "untenable" and reference to "gardening leave", combined with the handing back of keys and ID, meant that the Applicant had resigned. During

the course of supplementary questions, he explained that the Applicant had "walked out" a few times before but had always come back; a typical example of this was the Applicant's email of 16 September 2021 at **[164]**.

3.21 When cross-examined, he was consistent with his witness statement in all material respects.

4.0 Summary of closing submissions

On behalf of the Respondent

4.1 The Respondent submits that the primary question is: was the Applicant dismissed or did he resign? The burden of proving a dismissal is on the Applicant and if he fails to do that, his claims fails. In the absence of special circumstances, an employee who, when objectively considered, unambiguously indicates that he is resigning is bound by it. It is always a question of fact, dependent upon the evidence.

4.2 The crucial event was on Monday, 30 May 2022. The Tribunal needs to consider what actually took place, and the only witnesses who can help with that are the Applicant, Mr. Robilliard and Mr. Renouf – nobody else was present. The Applicant asserts that he did not resign and that he was going on "voluntary suspension" because he could be regarded as an insider threat. The Respondent submits that this is merely a recent invention; the Applicant clearly resigned, but subsequently changed his mind and has invented convenient facts to explain away his actions.

4.3 There was very detailed evidence from the Applicant concerning conversations he allegedly had with Mr. Robilliard and/or Mr. Renouf; there were long quotes in his witness statement. Normally the Respondent would suggest that this is very good evidence, but in this case the Respondent submits the opposite – it is very poor evidence. If anything, what the Applicant has said in his statement should cause the Tribunal to approach his evidence with caution. Not only does it affect reliability, but credibility. It is simply not plausible that the Applicant remembers exact dialogue nearly one year after the event.

4.4 Is it more probable than not that the Applicant's reportage is reliable? The Tribunal should bring to this assessment their individual experience and common sense. By way of example, consider the details contained in: **[54:76, 78, 84, 85, 86, 87]**; **[58:105, 106]**; and **[59:107, 108, 109, 110]**.

4.5 It is beyond belief that almost one year later, the Applicant remembers that level of detail. This very question was put to the Applicant, but he said that he had an excellent memory, but it seemed to fail him in relation to important matters. He doggedly insisted that is what was said, but then sought to rely upon the existence of notes that are now long gone. He then panicked and said that these "notes" were with his Advocate. The Tribunal should remember that just because the Applicant has lied about one thing (if so found), it does not mean that he has automatically lied about other things.

4.6 Compare and contrast the reliability and value of the Applicant's evidence with that of Mr. Robilliard and Mr. Renouf – their evidence did not tally in every respect; this is entirely consistent with honest witnesses giving different recollections of the same event. Where a witness is word perfect or evidence perfectly matches that from another witness, that can be a sign of manufactured evidence. On important matters they agreed.

4.7 Are Mr. Robilliard and Mr. Renouf both mistaken or are they inventing their evidence? They didn't avoid answering questions or seek to argue. They even admitted that they regarded themselves as friends with the Applicant.

4.8 Resignation is resignation. On 30 May 2022 the Applicant informed the Respondent that he was going on gardening leave. It was right for the Respondent to accept the objective interpretation of the Applicant's actions on that day. The Applicant also handed in his ID. The test to be applied is an objective one – the intention of the Applicant is to be tested objectively and not subjectively. If anything, the advice from the Employment Relations Service is evidence of what an independent third party thought of the Applicant's actions. Resignation is a contractual repudiation by the employee and can be accepted by the employer; if it is, the deal is done.

4.9 In ***Kwik-Fit (GB) Ltd. v. Lineham*** [1992] ICR 183, it was held that an employee is always able to give up employment. It is governed by the terms of the contract of employment that provide for the giving of notice; it does not require acceptance by the employer to be effective.

4.10 ***Denham v. United Glass Ltd.*** [1998] Lexis Citation 714: An applicant resigned in "clear and unambiguous terms". What constitutes "clear and unambiguous"? It is a question for the evidence and the Tribunal should not try to shoehorn this case into the facts of others.

4.11 ***Sothern v. Franks Charlesly & Co.*** [1981] WL 186837: Even if it is not the intention to resign, the non-disclosure of intention is of no value. The employer is not to be a mind reader. The Respondent says that the Applicant did intend to resign, and objectively that interpretation was correct. The Applicant was an experienced human resources manager and it is clear on the evidence that he was not angry at the time he acted as he did; he had had time to reflect. There is no basis for finding that special circumstances exist.

4.12 ***Sovereign House Security Services Ltd. v. Savage*** [1989] WL 650812: The events of 30 May 2022 amounted to a clear resignation by the Applicant; no special or "magic" words are necessary to affect a resignation, it can be assisted by actions. There will always be historical or background facts. Mr. Robilliard, for example, described the Applicant's previous "departures". This all goes into the mix when determining the Applicant's intention.

4.13 ***Rae v. Wellhead Electrical Supplies Ltd.*** Case No. 4110014/19: Words and actions together will assist the Tribunal in determining whether there was a resignation. The Respondent's primary point is that the Applicant resigned using clear and unequivocal words and actions; a reasonable person would have interpreted them as such. It is only in certain circumstances where the words spoken, or actions performed are ambiguous that means that there may be special circumstances where the Respondent should make further inquiries.

4.14 ***Sindy v. William*** [2020] HKCFI 2525: The primary submission here is that there is no need to consider special circumstances. The resignation was given calmly and not in anger. There was a long period of reflection by the Applicant over the weekend; he then returned on the Monday and carried on working. This was not a situation where the Respondent was desperate to take advantage of a resignation; there was no plan or staging of events. What actually happened was that the Applicant had made up his mind to resign if no apology was forthcoming from Mr. Robilliard. Reference to his situation might have been a precursor to a claim for constructive dismissal, but no such claim is before the Tribunal.

4.15 How much of an onus should be on the employer to discover whether a resignation was really intended? Is it really right that an employee can intentionally or unintentionally lay a trap by using ambiguous words and then say that the employer did not inquire, either adequately or at all? Take notice of the Respondent's email of 30 May 2022 (**[160]**) – what would have been the reaction of a reasonable employee? Surely such a person would refute the suggestion that they had asked for "gardening leave" or would have invoked the appeal procedure contained in the disciplinary manual. Significantly, the Applicant never responded with any mention of his concerns about the "security" situation of the business.

4.16 The Applicant cannot gainsay what was said in evidence concerning the questions asked of other employees and the Applicant after the resignation. There cannot have been a disciplinary investigation because the Respondent had clearly regarded the Applicant's employment as at an end.

<u>On behalf of the Applicant</u>

4.17 The Applicant argued that it is strange, if not unbelievable, that the Applicant would fabricate an account of making notes of conversations which were then discarded. The Applicant's evidence was that he made notes on "Post-Its" which he then digitised and sent to his lawyer. Consequently, there was no need for him to retain the originals.

4.18 It is also unbelievable that the Applicant having a good memory for precise words used during conversational exchanges implies that his evidence should not be believed or preferred. That is simply not the case. For example, see **[55:85.1]** where the Applicant's evidence is that Mr. Robilliard *"said something like ..."*. That is the Applicant being honest.

4.19 If Mr. Robilliard is right about the Applicant's behaviour on 30 May 2022 being unambiguous, why was it necessary to seek advice from the Employment Relations Service on the morning of 31 May 2022? The understanding of whether there had been a resignation or not must be made at the time. There is no evidence of what facts were given to the Employment Relations Service or what advice was given in return. This is such an important point for the Respondent that one might have imagined that evidence on this very point would have been called. It is a reasonable conclusion to draw that no evidence was called because Mr. Robilliard has misrepresented what happened.

4.20 Mr. Robilliard was inaccurate about the number of times that the Applicant had "walked out" in the past. This affects his credibility to the extent that he should not be believed more generally.

4.21 The Respondent is wrong to suggest that the Applicant had had a period of reflection between Friday afternoon and Monday morning. The evidence of what the Applicant was thinking about over the weekend does not support that submission.

4.22 The Respondent seeks to rely upon the Applicant not following the appeal procedure contained in the handbook at **[94]**. The Applicant explained why; he said that he feared that he would not receive a fair hearing and that he was seeking legal advice.

4.23 It is clear that there was an ongoing disciplinary investigation following the email of 31 May 2022. Quite simply, why would there have been a request for an account of what happened if the Applicant's employment had been terminated by his resignation? Mr. Renouf explained this as a personal fact-finding mission; that is simply not a credible explanation.

4.24 The concept of "special circumstances" involves an analysis of the Applicant's emotional state and the Respondent's type of business. The Tribunal needs to look very carefully at the words used. When considering the "ordinary meaning" or words used, that must be considered as being at the time that the words were used.

4.25 Certain things are not in dispute: the relevant salary figure; the Applicant's security clearance; the Applicant's knowledge of "insider threat" and "disgruntled employee"; Mr. Robilliard's knowledge; the fact of the dispute on Monday, 30 May 2022 and the question of who should apologise; and the fact that the Respondent did not follow any procedure before dismissing the Applicant.

4.26 When considering the Applicant's oral evidence have regard to his evidence that his position was "untenable". He asked to be placed on gardening leave "*or something*". The dispute was "*noted*". He asked for an investigation and took the responsible action of removing himself from the possibility of further accusations. It is not clear that the language used by the Applicant was a clear an unambiguous assertion of resignation. He had no intention of resigning, merely of removing himself pending an investigation. The fact that he said he was going to consult a lawyer was a clear indication that there was an ongoing dispute between the Applicant and the Respondent.

4.27 The Applicant gave honest and solid evidence. His evidence was credible and believable; it was not fabricated. Compare that with Mr. Renouf's evidence: it is inherently unreliable and should be treated with caution.

4.28 Mr. Robilliard conceded that: the Applicant was emotional on 30 May 2022; the Applicant worked in a stressful situation; the Applicant did not remove all his personal belongings on 30 May 2022; the Respondent was aware of the Applicant's health and personal problems; and an employee would have to hand in keys and ID if dismissed. These all amount to special circumstances, of which the Respondent was admittedly aware, that mean that the Respondent should have taken time to confirm whether the Applicant really intended to resign. The evidence indicates that the Respondent did not understand the Applicant's intention; Mr. Robilliard and Mr. Renouf simply assumed that the Applicant intended to resign. The fact that they thought it necessary to take advice on the morning of 31 May 2022 means that they could not have understood the Applicant's intention.

4.29 The applicable law is as set out in the skeleton arguments lodged on behalf of the Applicant.

5.0 Legal Framework

5.1 The issue for the Tribunal to determine in this case is whether the Applicant resigned or was dismissed. It is that simple. The Tribunal accepts the submission that if unambiguous words and/or actions are used by an employee that, on an objective analysis, amount to a resignation, the employer is entitled to regard the employee as having resigned. The only exception to this is where there has been a "resignation in haste" in which situation the consideration of special circumstances may be necessary. The class of what may amount to special circumstances is not closed and it will depend, almost invariably, upon the circumstances of each case. They have been held to include: pressure on an employee to resign (especially when amounting to coercion from management); the personality of the employee; the existence of stress; and immaturity.

The burden of proof

5.2 As has already been discussed, because the Respondent denies that the Applicant was dismissed, it is for the Applicant to prove, on the balance of probabilities, that he was, in fact dismissed. In this case, that is logically equivalent to proving that he did not resign. It is if, and only if, the Applicant proves that he was dismissed, that the burden of proof then switches to the Respondent to prove, again, on the balance of probabilities, that the dismissal was fair.

6.0 Facts Found

6.1 The circumstances surrounding the events of the afternoon of Monday, 30 May 2022 started on Friday, 27 May 2022. The Tribunal finds, without hesitation, that the events on the morning of 27 May were childish and were not worthy of grown men. The Applicant and Mr. Robilliard both thought that they were in the right and neither was prepared to back down. That sort of behaviour is usually found in the school playground. It is especially regrettable that Mr. Robilliard, the managing director of the Respondent, found himself unable to defuse and manage the situation. Managing calm situations is easy; it takes real skill to manage difficult ones.

6.2 It is also very clear that the Applicant returned to work the following Monday and carried on, ostensibly, as if nothing had happened the previous Friday. It was only towards the end of the day that there was any further interaction between the Applicant and Mr. Robilliard. That interaction did not go well; it resulted in further disagreement.

6.3 The Tribunal finds that the Applicant returned his keys and ID to the Respondent. The Applicant also removed nearly all of his personal possessions from his office (the only item he left was a desk fan). He made reference to his position being "untenable", the possibility of being put on "gardening leave" and being "in dispute" with the Respondent.

6.4 The following day, 31 May 2022, the Respondent emailed the Applicant (see **[169]**) in terms that the request for gardening leave was accepted and termination of employment would be activated. A substantive response followed on 10 June 2022 from the Applicant's lawyer (see **[170]**).

6.5 The Tribunal finds it highly significant that the Applicant did not seek to take issue with the content of the email of 31 May 2022 almost immediately. It matters not if that was on the advice of his lawyers, as claimed by the Applicant; the ultimate failure to act was the Applicant's. In particular, the Tribunal finds it is more likely that this reaction arose from a genuine and intended resignation by the Applicant on 30 May 2022 than from a dismissal by the Respondent on 31 May 2022. Equally, the Applicant did not seek to explain that his apparent resignation (as the Respondent clearly saw things) was an error or an action in haste. The Applicant did nothing immediately following receipt of the email dated 31 May 2022 to correct, what on his case must have been, the Respondent's mistaken belief that the agreement to "gardening leave" was in response to the Applicant's direct request.

6.6 The phrase "gardening leave" is a term of art in employment law and refers to a period of notice (that may follow either a resignation or a dismissal) during which the employee is not required to attend at his place of work, but is otherwise bound by the terms of his contract of employment. It is clear that

neither the Applicant nor the Respondent really understood what was meant by this term. Nevertheless, the Tribunal finds that the conduct of, and words used by, the Applicant (who, as the Respondent's HR manager, could be expected to have relevant knowledge and experience) on 30 May 2022 were sufficiently clear and unambiguous to amount to a resignation, objectively viewed.

6.7 The Tribunal also finds it significant that, although the Applicant made much of having been found guilty of misconduct by Mr. Robilliard, the Applicant made no attempt to trigger the appeal provisions contained in the handbook. The Applicant had, or reasonably ought to have had, knowledge of that procedure by virtue of his role as HR manager. That would have been a very simple step and one that might have brought resolution; it is insufficient for the Applicant to say that he doubted that he would have received a fair hearing.

6.8 The Tribunal has also considered whether special circumstances exist that should have required the Respondent to hesitate and make further inquiries of the Applicant to ascertain whether the perceived resignation was real or erroneous. The Applicant gave evidence that he was mature and an experienced human resources manager. He left work early on Friday, 27 May 2022 following a disagreement with Mr. Robilliard, but chose to return on the following Monday and work normally for a whole day. To expect an employer, in those circumstances, to treat an employee, who apparently and unambiguously resigns, as subject to "special circumstances" requiring further investigation, is a counsel of perfection and goes too far. Accordingly, the Tribunal finds that no special circumstances exist in this case.

7.0 Conclusion

7.1 The Tribunal finds that the Applicant resigned on 30 May 2022 and dismisses the Applicant's claim for unfair dismissal.

8.0 Costs

8.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* and *The Employment Protection (Recoverable Costs) Order, 2006*.

8.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

Advocate J. Hill
Chairman of the Tribunal

05/03/24

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Signature of the Chair Date