

# When is a resignation not a resignation?

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In [Omar v Epping Forest District Citizens Advice \(EA-2021-000595-JOJ\)](#), the EAT considered how to construe words spoken “in the heat of the moment” that are said to be words of dismissal or resignation, and conducted an extensive and very useful review of the relevant case law. In the present case, the Claimant contended that ***Sothorn v Frank Charlesly [1981] IRLR 278*** established a “special circumstances exception” into which his situation fell. The ET had rejected this submission and found that the Claimant had resigned. The EAT allowed the Claimant’s appeal and remitted the case for a fresh hearing.

The Claimant was line managed by Ms S. On 3<sup>rd</sup> February 2020 the Respondent’s CEO sent the Claimant a letter about his timekeeping. The Claimant told Ms S that he was unhappy about the letter and verbally resigned. Ms S advised the Claimant to calm down and refused his resignation. On 5<sup>th</sup> February 2020 the Claimant became angry about something else and resigned again, with notice; again Ms S advised him to calm down and did not accept his resignation.

On 19<sup>th</sup> February 2020, it was agreed between the parties that Ms S asked the Claimant about his holiday dates; the Claimant became angry, swore at Ms S and used words of resignation. There was a dispute of fact in that the Claimant averred that he and Ms S had met with the CEO later, who had asked them to consider continuing working together and had also offered him an alternative role, with time to consider it. The Respondent averred that Ms S had accepted the Claimant’s verbal resignation and the purpose of the later meeting with the CEO was to ensure that he and Ms S were able to work together over the Claimant’s notice period.

The Claimant averred that on the 21<sup>st</sup> February 2020, the CEO had told him that Ms S had decided that she could not work with him and asked him to put his resignation in writing, to which he agreed. However, on 23<sup>rd</sup> February 2020 he instead asked, in writing, to withdraw his resignation as it was a “heat of the moment” resignation on the basis of unresolved grievances and suggested that he relocate to another office (or be disciplined and reviewed after 6 months). The Respondent refused to accept his retraction of his resignation and treated him as having given 1 month’s notice from 19<sup>th</sup> February 2020.

The EAT allowed the appeal on the basis of the following:

- (a) Having fully reviewed the relevant case law (paragraph 97 of the judgment), there was no “special circumstances exception”; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context.
- (b) Once notice has been given, it can only be retracted with the other party’s agreement.
- (c) Words of dismissal or resignation (or words that might amount to such) must be construed objectively, taking into account all of the circumstances of the case, and in accordance with normal rules of contractual interpretation. Uncommunicated intentions of the party who spoke them are irrelevant. The recipient’s subjective understanding may be relevant, but will not be determinative.
- (d) The test is whether it would be apparent to a reasonable bystander in the recipient’s position that:
  - a. The speaker used words of immediate dismissal or resignation (for summary termination) or immediate notice of dismissal or resignation (for termination on notice). Expression of a general intention to resign in the future is insufficient; and
  - b. That the dismissal or resignation was conscious and rational/seriously meant/ really intended – in other words, that the speaker appeared to genuinely intend to resign or dismiss, and was in their right mind when they spoke the words.
- (e) The EAT commented that in most cases there will be no doubt that the words were really intended. The ET is not bound to go further than considering the objective meaning of the words unless a party raised a case that they were not “really intended” (or if the circumstances of the case are such that the ET is bound by fairness considerations to raise the issue itself).
- (f) The relevant point in time for the objective assessment described above is when the words are spoken, and whether they reasonably appear to have been “really intended” at the time they were spoken.

- (g) Evidence as to what happened afterwards is admissible insofar as it is relevant and casts light objectively on whether the termination was “really intended” at the time.
- (h) The distinction between a “really intended” oral termination and one where there has been a change of mind is likely to be fine, and which side of the line the case falls is a question of fact for the ET.
- (i) The same rules apply to written words of resignation/dismissal as to spoken words.

## Conclusions

This is a lengthy judgment and the EAT’s review of the relevant case law is well worth reading in full. The distillation of these authorities into the above points is a helpful reminder to practitioners that contracts of employment are still contracts, and that classical rules of contractual interpretation apply rather than fairness considerations imported from the statutory tort of unfair dismissal.

One of the difficulties for the Respondent in this case was that the ET appears not to have made sufficient factual findings to facilitate a submission that the outcome would have been the same in any event. From the EAT’s judgment, it appears that the ET had made no findings as to what had actually happened on 19<sup>th</sup> February 2020, or as to the words used by the Claimant (Judge Stout observes with some surprise that the ET had expressly stated that it was not necessary to resolve the dispute between the parties); about the meeting in the afternoon; or about the subsequent meeting on 21<sup>st</sup> February 2020. The ET may have felt that the Claimant’s resignation was binding regardless of whether his account or the Respondent’s account was correct, but this judgment is a salutary reminder that specific findings of fact on words and conduct during relevant meetings must be made where words of resignation or dismissal are in issue.

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