

**XpertHR Weekly Podcast****Original XpertHR podcast: 20 August 2015**

- Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. I am joined this week by Principal Employment Law Editor, Stephen Simpson. Hi Stephen. Thank you for joining me this week on XpertHR Weekly.
- Stephen Simpson: Hi Sue.
- Susan Dennehy: Ending the employment relationship is usually a straightforward affair. The employee either resigns or the employer dismisses the employee. However, sometimes things can get heated, words are exchanged and it's not clear whether the employer can be taken to have dismissed the employee or the employee has resigned. This week we'll be looking at heat of the moment dismissals and resignations. We discuss a recent case and go on to consider whether there can be any good news for employers in these types of situations.
- Well, as Lady Macbeth said, 'What's done cannot be undone.' or can it, Stephen? But shall we start by looking at the typical scenarios that we're talking about here? [0:00:51.1]
- Stephen Simpson: Yes, typically the manager or the small business owner gets into an argument with the employee, angry words are exchanged and the manager or small business owner loses their temper and either explicitly dismisses the employee or says words that could be construed as a dismissal.
- Susan Dennehy: And the employee walks out? [0:01:06.9]
- Stephen Simpson: Yes, the employee basically takes the words as a dismissal and leaves the workplace, subsequently claiming unfair dismissal. So that's really the typical scenario that we're talking about today.
- Susan Dennehy: Okay. And why is it important that the termination of employment needs to be labelled as a dismissal? [0:01:19.5]

- Stephen Simpson: So whether the termination is a dismissal or a resignation is vital in these cases because if it's found to be a dismissal, an instant dismissal is, of course, procedurally unfair, so the employer doesn't really have a leg to stand on in its defence in any subsequent tribunal claim.
- Susan Dennehy: And what if it's a resignation? [0:01:34.4]
- Stephen Simpson: Then on the other hand, if it's a resignation, ie the employee has simply walked out in response to the manager's rudeness and doesn't return, the case becomes a constructive dismissal claim, which as we know is much harder to win. The claimant there would have to show that the employer's behaviour towards them was so bad that it fundamentally breached the implied term of trust and confidence, forcing the employee to resign.
- Susan Dennehy: And it's not just heat of the moment, is it? These words can be spoken and they're often ambiguous, aren't they, in these situations? [0:02:00.5]
- Stephen Simpson: Yes, so what you tend to find is that rather than saying, 'You're dismissed,' or 'You're sacked,' or say, 'You're fired,' what you tend to see is that the manager will say something rude to the employee, to the effect that they should go away or they've had enough of working with the employee.
- Susan Dennehy: Often they are really ambiguous, something like, 'If you don't like working here, you know, that's not a problem.' But can you give us some more examples of ambiguous words like that? [0:02:21.4]
- Stephen Simpson: Yes, I think it's good to have a look at some real life cases, so in the past we've had cases where an employee has been told, 'If you do not like the job, fuck off.' In another case the manager said to the employee, 'You're finished with me.' And in one case the spoken words to the employee were, 'Go, get out, get out.' So the key question in those sorts of cases is whether these phrases alone can amount to a dismissal.
- Susan Dennehy: Well they sound fairly clear cut, but what principles do employment tribunals apply in these circumstances? [0:02:48.1]
- Stephen Simpson: So the first thing to say is that if clear words of dismissal are spoken, employees are generally entitled

to take this as a dismissal at face value and to treat the contract of employment as being terminated.

Susan Dennehy:

And what's the leading case at the moment?  
[0:03:01.1]

Stephen Simpson:

So I would say the key case now is the Court of Appeal decision in *CF Capital PLC and Willoughby*, which is actually quite an odd case where rather than spoken words of dismissal, the employee received a letter terminating her contract of employment after a mix-up in which a manager mistakenly thought that the employee had agreed to become self-employed. So in effect the manager accidentally sent clear words of dismissal to the employee, which the employee took at face value.

Susan Dennehy:

And did the Court of Appeal hold that the employer could retract the dismissal in that situation? [0:03:27.8]

Stephen Simpson:

No, the Court of Appeal held that the employee was entitled to take the letter at face value, even though it was a mistake. So the dismissal stood because the words were clear.

Susan Dennehy:

And are there any exceptions to that principle?  
[0:03:37.5]

Stephen Simpson:

There may be extremely limited special circumstances whereby an employer may be able to retract a dismissal.

Susan Dennehy:

And is there any case law that you have that you can tell us that can back that up? [0:03:45.6]

Stephen Simpson:

Well there's an old case from 1983 called *Martin and Yeoman Aggregates Ltd*, in which the EAT said that this was possible, although I think it would have to be almost immediate retraction, and it's not really an exception that the tribunal has embraced since then.

Susan Dennehy:

Can you think of any examples where this exception might come into play? [0:04:02.8]

Stephen Simpson:

Well I suppose you could have a scenario where a couple of managers are in a meeting with an employee and one manager gets annoyed and on impulse sacks the employee but the second, cooler, more experienced manager steps in and retracts the words of dismissal within seconds. But as I say, it's not really an exception to put any particular faith in.

- Susan Dennehy: Okay, and what's the principle if the words are ambiguous? We mentioned a few examples earlier. [0:04:22.9]
- Stephen Simpson: So the general rule then is that if a reasonable person would, in all the circumstances, perceive the words or actions as amounting to a dismissal, it will constitute a dismissal. If the employee unreasonably interprets the words as a dismissal and leaves the workplace and doesn't return, then they'll be taken to have resigned.
- Susan Dennehy: So the words spoken won't be taken in isolation. You will be looking at the background and what's gone on? [0:04:43.3]
- Stephen Simpson: Absolutely, so surrounding circumstances such as the manager's and the employee's actions before and after the dismissal and the nature of the workplace also come into play.
- Susan Dennehy: And can you give us some examples of some of those relevant circumstances you mentioned there? [0:04:54.8]
- Stephen Simpson: So it may be useful just again to look back at some old cases. So in a case called *Futty v Brekkes (D & D) Ltd*, the tribunal held that the words, as we mentioned before, 'If you do not like the job, fuck off,' were spoken to a fish worker on a dock, where this sort of language was common when workers were speaking to each other informally and similar phrases had been spoken in the past and not taken as a dismissal.
- Susan Dennehy: And were there any other relevant circumstances taken into account? [0:05:17.3]
- Stephen Simpson: Well there was evidence in that case that had the manager really meant to dismiss the claimant, more formal language would have taken over. Witnesses also attested to believing at the time that the claimant had simply gone off in a huff, rather than being dismissed.
- Susan Dennehy: And there must be lots of other examples that you've got from case law that you can give us. [0:05:32.6]
- Stephen Simpson: Yeah, these are quite useful to look back on. So again just drawing on an earlier example, in a case called *Tanner and DT Kean*, the EAT said that the words, 'You're finished with me,' were spoken in annoyance,

more by way of reprimand than with the intention of actually dismissing the claimant.

Susan Dennehy: Well they're quite old cases that you've mentioned. Do these cases still arise? [0:05:50.9]

Stephen Simpson: Yes. We've just actually reported an unfair dismissal tribunal case called *Townsend and Commercial Storage Ltd*, which I think is a great example for employers to show their line managers what can happen if they dismiss an employee during a moment of anger.

Susan Dennehy: And who were the main protagonists in that case? [0:06:05.0]

Stephen Simpson: So you had the claimant, Mr Townsend, who was a driver for a small family business run by a Mr Cook. They had known each other for over twenty years. Mr Townsend was seen as a good, if rather quiet, employee who just got on with things.

Susan Dennehy: And can you tell us about the events leading up to the dismissal in that case? [0:06:20.1]

Stephen Simpson: Sure. So the pair got into an argument in the workplace after Mr Cook put pressure on Mr Townsend to come into work while he was on annual leave to set himself up in a new truck that had just been purchased, and he was taking it out on his first day back.

Susan Dennehy: And did Mr Townsend agree to the request to go in early back from his holiday? [0:06:35.6]

Stephen Simpson: Not surprising, he resented being disturbed while on annual leave but did eventually decide to go into work on the Friday before he was due to return, ie the last day of his holiday. He was actually due back on the Monday. So to cut a long story short, the two men got into an argument and Mr Townsend swore during the argument and then, according to Mr Townsend, Mr Cook said to him something along the lines of, 'Get out of the yard and don't bother coming back on Monday.'

Susan Dennehy: And how did Mr Townsend respond to what Mr Cook had said to him? [0:07:01.1]

Stephen Simpson: So he took him at his word, thinking that he had been dismissed, and left the workplace never to return.

- Susan Dennehy: And were there any other relevant circumstances?  
[0:07:09.4]
- Stephen Simpson: So other notable circumstances were that he left his keys and work mobile phone behind and possibly most importantly, Mr Cook made no subsequent attempts to contact him in the days that followed. There wasn't any contact, in fact, until he was sent his P45 a few weeks later.
- Susan Dennehy: And Mr Townsend he went on to claim unfair dismissal, didn't he? [0:07:26.3]
- Stephen Simpson: Exactly. And the case basically boiled down to one issue – whether those words, 'Don't bother coming back on Monday' could amount to a dismissal.
- Susan Dennehy: And how did the tribunal approach the case?  
[0:07:34.8]
- Stephen Simpson: So the tribunal recapped really nicely and succinctly on the principles when dealing with ambiguous words of dismissal. It said, 'The determining factor is not the subjective intention of the speaker. It is instead what a reasonable person would have understood by the word used and that it also may be relevant to look at what happened before and after the relevant exchanges.' So really recapping on the case law principles that we've been discussing.
- Susan Dennehy: And how did the tribunal think the words, 'Don't bother coming back on Monday,' could be construed as a dismissal? [0:08:00.7]
- Stephen Simpson: Yes, the tribunal concluded that a reasonable person in Mr Townsend's position would have understood the words as being a dismissal. The requirement not to come back indicated something more than a temporary departure from the workplace, and importantly both the claimant and the employer behaved in a way that suggested a dismissal. Mr Townsend left his workplace property behind and didn't return the following Monday, and the employer's failure to act also suggested a dismissal. If the claimant hadn't been dismissed, Mr Cook would have contacted him on the following Monday to enquire as to why he hadn't come into work.
- Susan Dennehy: So it inevitably followed that the dismissal was unfair?  
[0:08:31.5]

- Stephen Simpson: Yes, absolutely. So once the tribunal concluded that Mr Townsend had been dismissed, it upheld his unfair dismissal claim without really any hesitation because there was a total failure to follow any sort of fair procedure.
- Susan Dennehy: And was there any good news for the employer in this case? [0:08:44.6]
- Stephen Simpson: Really the only good news that I can give the employer in this case was that the claimant's compensation was reduced by 20% because of his argumentative behaviour, which contributed to things getting out of hand.
- Susan Dennehy: In practice, what can employers do if a foolish manager dismisses an employee in the heat of the moment? [0:08:58.5]
- Stephen Simpson: So we've said that in purely legal terms a dismissal can't be retracted, but actually there's nothing to stop the employer from contacting the employee, for example the next day, and explaining that the manager acted in haste and that the employee should come back into work to discuss the matter rationally. Employers will probably find that the employee will be regretting the incident and may be prepared to actually come back to work.
- Susan Dennehy: And some employers will offer an employee their job back, won't they, in order to mitigate their losses? [0:09:22.8]
- Stephen Simpson: Yes, it's much better than ending up in a tribunal claim.
- Susan Dennehy: But I think it's fair to say, Stephen, that you would say the best way is to avoid the problem arising in the first place? [0:09:30.5]
- Stephen Simpson: Yes, as always with workplace problems, prevention is better than cure. So employers may wish to show managers during training, for example training on dealing with difficult conversations or difficult employees. Some of these cases there's examples, so that they realise they should never instantly dismiss an employee in anger.
- Susan Dennehy: Thank you very much, Stephen, for that very useful guidance.
- Stephen Simpson: Thanks, Sue.

Susan Dennehy:

There's more information on this issue on our website in the termination of employment section of the employment law manual. There is also a 'How to deal with a heat-of-the-moment resignation'. There are also some model letters on heat of the moment dismissals and resignations that Stephen mentioned earlier, and a frequently asked question on resignation, including whether or not a resignation can be retracted.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then, it's goodbye from us.