

INDIGNATION NOT RESIGNATION: AN EMPLOYEE STORMING OFF DOES NOT MEAN SHE IS QUITTING

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In a recent decision,^[1] the Ontario Superior Court of Justice clarified two important aspects of employment law: (1) what is required for conduct to constitute a resignation from employment and (2), when may an employee resile from a resignation.

Facts

Johal was employed as a senior law clerk with the Defendant and was the primary law clerk to a lawyer at the firm, Clark, for the past seven years.

In June, 2015, Clark informed Johal that going forward, another law clerk would be responsible for coordinating Johal's work, although the plan was not yet finalized. The Court found that Clark was aware that Johal and the other law clerk did not get along and that Johal was upset to learn of the new work structure.

The following day, Johal removed her personal belongings from the office and returned her security pass to Clark. The Defendant claimed that Clark asked if Johal was resigning to which she replied that she had "hit the end of the road". The Defendant did not attempt to contact Johal further and she did not return to work or contact anyone at the Defendant until the following Tuesday, six days after the initial discussion and five days after she removed her belongings. The Defendant did not allow her to return to work and took the position that she resigned.

Did the Plaintiff's conduct amount to a resignation?

The Court found that Johal's actions did not constitute a proper resignation and found that she was wrongfully terminated when she was not permitted to return to work.

The case law in Ontario has established that a valid and enforceable resignation must be clear and unequivocal. To be *clear* and *unequivocal*, the resignation or conduct must objectively reflect an intention to resign. The courts will look at the surrounding circumstances to determine if a reasonable person, viewing the matter objectively, would have understood the employee to have resigned. Courts have in the past found that a resignation during "a spontaneous outburst in highly charged emotional circumstances can undermine its

essential voluntariness”.[2]

The court found that Johal had not intended to resign and considered many factors including:

- Johal was 62 years of age and employed with the firm for 27 years;
- She was called into a meeting without any notice and the information about the new plan had not yet been finalized;
- Clark knew Johal did not get along with the other law clerk;
- Clark did not attempt to discuss the meeting with Johal the following day;
- Clark did not attempt to set up a subsequent meeting or try and discuss the matter with Johal when she returned her security pass;
- No one at the firm attempted to contact Johal after she returned her security pass;
- Johal had never threatened to resign in her previous 27 years and her sudden departure was out of character; and
- Johal did not provide the firm with written notice and did not state verbally that she was resigning.

Was the Plaintiff entitled to resile from the resignation?

Even though the Court found that there was no resignation in this case, it found that an employee may resile from the resignation until one of the following two situations occur:

1. The employer accepts the resignation; or
2. The employer relies on the resignation to its detriment.

Using the principle of simple contract law, an employer may accept the employee’s offer to resign and confirm that acceptance in writing. The Court found that if the offer has been accepted, there is no need for the employer to show detrimental reliance. However, this only applies if the employee has actually resigned (i.e. given a clear and unequivocal notice of resignation).

If the offer has not been accepted, the employee may still be prevented from resiling from the resignation if the employer had taken steps in reliance on the employee’s resignation, provided that the employer can show actual evidence of detrimental reliance.

What Employers Should Know

This case imposes a duty on employers to do more than simply accept an alleged resignation at face value. In cases where there is no clear and unequivocal resignation and the employer is relying on the employee’s actions or verbal statements, the employer should make further inquiries to determine if the employee truly intends to resign. This is particularly important where the surrounding circumstances indicate the employee

was upset at the time of resignation, or if the resignation followed closely at the heels of a conflict as the employee may have a change of heart.

It is prudent for employers to document resignations in writing since verbal resignations may not be “clear and unequivocal”. However, given the case law, even written resignations may be disputed as involuntary, especially if it was signed in the heat of the moment. Employers should give their employees some time to cool off and then follow-up with the employee. The “hear nothing, see nothing, speak nothing” response to an employee’s resignation will be frowned upon by the courts.^[3]

Finally, after taking the necessary steps to ensure the employee does intend to resign, an employer should send a formal acceptance of that resignation as soon as possible. Otherwise, an employee may be entitled to change his or her mind and resile from the resignation.

If you have any questions regarding this case or handling employee resignations, do not hesitate to contact a member of our labour and employment group.

by Dave J.G. McKechnie and Bettina Xue, Student-at-Law

[1] *Johal v Simmons da Silva LLP*, 2016 ONSC 7835

[2] *Gebreselassie v VCR Active Media Ltd*, [2007] OJ No 4165, 161 ACWS (3d) 261.

[3] *Bru v AGM Enterprises Inc*, 2008 BCSC 1680.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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