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When Does a Resignation Really Mean "Goodbye"?

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Employers often assume receiving a notice of resignation creates a clean break in the employment relationship. However, as three recent decisions from the Court of Appeal for Ontario suggest, the fact an employee has "resigned" doesn't always mean the employment relationship has come to an end, nor that the employer is absolved from any further liability.

English v Manulife Corporation[1]: Resignation must be "clear and unequivocal"

In this 2019 decision, the Court of Appeal admonished the employer for enforcing what the court saw as a tentative resignation, and then resiling from a promise to allow the employee to "change her mind."

Manulife Financial sought to upgrade its customer service department by bringing in a new computer system. Elizabeth English, a 66-year-old, 10-year employee, did not want to learn the new system and in September 2016, provided written notice of resignation, effective Dec. 31, 2016. At the time, English told her supervisor she was not certain she wanted to retire, and was assured she could change her mind if she wished.

In October 2016, Manulife suspended its conversion to the new computer system. On hearing this, English advised her supervisor she no longer wanted to retire. Manulife did not accept English's change of heart, but no one at Manulife expressly advised English of this. In December, English was asked to stop coming to work in accordance with her resignation. She sued alleging wrongful dismissal and claimed damages equivalent to 16 months' compensation.

In Canada, there is a line of decisions in which an employee is given an option to rescind a notice of resignation if the employer has not taken a step in reliance on it (for example, hired or appointed a replacement). Relying on this line of decisions, English argued she could retract her resignation at any time because Manulife had not taken a step after receiving it.

[1] *English v. Manulife Corporation*, 2018 ONSC 5135; rev'd 2019 ONCA 612

Manulife argued it was entitled to accept the resignation without the need to take any further action. It relied on more recent decisions from Nova Scotia and Ontario in which the courts held the mere acceptance of a notice of resignation is sufficient to make the resignation effective.

The motion judge agreed with Manulife.

However, on appeal, the Court of Appeal for Ontario reversed the ruling of the motion judge, on the factual basis the resignation was not "clear and unequivocal." To the contrary, the court held, Manulife knew English might change her mind and was bound to its promise she could do so. As such, the termination of her employment was a wrongful dismissal. The Court of Appeal expressly declined to address the broader legal issue of when an unequivocal notice of resignation may be rescinded by an employee.

However, one of the Nova Scotia decisions[2] (referenced above), in which that legal issue was addressed, is worth noting. Essentially, a long-standing employee threatened to quit if he wasn't given a raise. The employer declined to give the raise and "accepted" the employee's resignation. The employee asked the employer to reconsider but the employer refused to do so. The employee sued for wrongful dismissal.

There was a factual dispute over whether the employee's initial threat was idle or real. The court found it was real, based in part on corroborating evidence from other employees who testified the employee had expressed unhappiness with his pay for some time and was already in the process of securing other employment for a higher salary. The employee argued that even if his ultimatum constituted resignation, he had resiled from it before his employer acted on it to its detriment.

The court rejected that argument for the following reasons:

> The retraction of a clear notice to quit must occur and be communicated to the employer before the employer communicates acceptance of the resignation to the employee. This is a contracts case. Even taking into account the special protection of employees under employment contracts, it should not be open to an employee to unilaterally retract an offer to quit once it has been accepted and that acceptance is communicated to the employee by the employer.[3]

This legal analysis was affirmed by the Nova Scotia Court of Appeal in 2015:

> **The appellant reads this passage as saying that the employer must show detrimental reliance in order for a resignation to ever bind the employee. Respectfully, this is not the law**. The passage from Ball quoted above, and the jurisprudence upon which it relies, only provides for resilement in situations where the resignation has not been accepted by the employer. **If the resignation has been accepted, an employer's detrimental reliance upon the resignation is irrelevant**. Mr. Kerr has not provided any authority in which an employee was allowed to resile from an accepted resignation. Nor am I aware of any. As I will explain, there are a

[2] *Kerr v. Valley Volkswagen*, 2014 NSSC 27
[3] *Ibid*, para. 41

> number of cases in which an employee has been allowed to resile from an offer of resignation, but in each case, the resilement occurred prior to the acceptance of the offer.[4]
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> **[emphasis added]**

Ariss v. NORR Limited Architects & Engineers[5] - Resignation at employer's behest not enforceable

In this 2018 decision, the Court of Appeal reaffirmed that a resignation must be genuine to be enforceable, and any attempt to force a resignation to create a break in service may not be enforceable.

John Ariss began his employment at an architectural firm in 1986. In 2002, the firm was bought by NORR Limited Architects & Engineers and Ariss' employment was terminated. However, on that same day, he was hired by NORR on terms that limited Ariss' entitlement upon termination only to the minimum statutory entitlements under the Ontario Employment Standards Act, 2000 (ESA). A similar employment agreement was signed in 2006 when Ariss requested and was provided an increase in weekly hours.

In 2013, Ariss requested and negotiated a move from full-time to part-time work. NORR agreed but only if Ariss resigned from his full-time position and accepted a "new offer of employment for part-time hours" in which he waived any entitlement to notice or severance on account of his employment prior to 2013. With the benefit of independent legal advice, Ariss agreed.

In 2016, Ariss was terminated without cause and provided with his ESA minimum entitlements, based on his 2013 "new" hire date. At the time of his termination, he had been employed by NORR and the previous employer for an aggregate of 30 years. He brought an action for wrongful dismissal claiming an entitlement to common law reasonable notice based on the 30 years of service.

The motion judge found Ariss had been continuously employed since 1986 and awarded him the equivalent of eight weeks' notice and 26 weeks' severance pay under the ESA (the maximum amount allowable). With respect to Ariss' "resignation" and rehiring in 2013, the judge found this was "an entirely artificial attempt to create an interruption in employment when in fact there was none."

The Court of Appeal upheld the ruling of the motion judge. Specifically, on the issue of Ariss' purported resignation and rehire in 2013, the court held NORR's efforts to create a break in the employment relationship was an attempt to illegally contract out of the minimum entitlements under the ESA.

However, this illegality did not vitiate the 2006 contract in which had Ariss waived his entitlement to common law reasonable notice. The waiver of common law reasonable notice therefore remained valid and binding. According to the court, Ariss "fully understood, both when working full-time and when working part-time, that his entitlements on termination would be in accordance with the ESA."

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[4] *Kerr v. Valley Volkswagen* , 2015 NSCA 7, para. 14
[5] *Ariss v. NORR Limited Architects & Engineers*, 2018 ONSC 620; aff'd 2019 ONCA 449

Theberge- Lindsay v. 3395022 Canada Inc.[6]*:* Rehire post-resignation is new employment

From this decision, we learn that if a resignation is clear, unequivocal and voluntary, acceptance of it by an employer may be sufficient to create a binding agreement, and any subsequent employment with the same employer (meaning the employee changes her mind) is a fresh employment relationship.

Jasmine Theberge-Lindsay began working as a dental hygienist for the defendant dentist and its corporate predecessors (Dr. Kutcher) in 1993. In 2005, Theberge-Lindsay provided two months' notice of resignation but, prior to departure, changed her mind and indicated she wished to remain employed. Dr. Kutcher agreed, provided Theberge-Lindsay execute a new employment agreement which limited her termination entitlements to the ESA minimum amount. Theberge- Lindsay had executed two similar agreements during her tenure from 1993 to 2005.

The new agreement was executed and Theberge-Lindsay's employment continued without interruption until 2012, when her employment was terminated and she sued for wrongful dismissal.

The trial judge held Theberge-Lindsay had not received consideration for the earlier employment agreements and, thus, they were unenforceable. She was awarded 15 months of damages in lieu of common law reasonable notice.

On appeal, the employer argued the 2005 agreement was enforceable and served to limit Theberge-Lindsay's entitlement to her ESA minimums, calculated on the basis of her 2005 "rehire" date — not on her entire period of service. The Court of Appeal agreed, concluding "Theberge-Lindsay's unequivocal resignation and rehiring in 2005 marked a break in the employment relationship after which an entirely new contract was reached between her and Dr. Kutcher."

Tips for employers

If you're scratching your head, trying to rationalize these decisions, you're not alone. To help you sift through it all, consider the following take-aways:

Notice of resignation or retirement must be clear and unequivocal: A hastily given notice of resignation or retirement, or one given with qualifications, may not be upheld by a court. It is a fact-driven analysis, based on an objective standard. The court must be satisfied, given all the surrounding circumstances, that a reasonable person would understand by the employee's actions that they had resigned. An employer that does not carefully consider all of the surrounding facts, or chooses to act willfully blind, does so at some risk.

For example, if an employee, in a state of frustration or emotional angst makes a hasty statement that they quit and, shortly thereafter, realizing the rashness of this statement or action, either retracts it in short order or engages in discussions with the employer to patch up the dispute leading to the declaration of intent to quit, a court may find the employee did not quit. On the other hand, when the words or actions of an employee demonstrate a clear intent to resign, either unconditionally or as part of an ultimatum, courts have not hesitated to find the employee quit.

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[6] *Theberge-Lindsay v. 3395022 Canada Inc*., 2018 ONSC 3222; rev'd 2019 ONCA 550

Notice of resignation must be genuine to be enforceable: Any attempt to use a resignation as a means of providing a "break in service" may not be enforceable. However, if an employee provides clear and unequivocal notice of resignation but later has a "change in heart," a court may treat any period of subsequent employment as "new employment" for termination entitlement purposes.

Acceptance of a resignation may be sufficient to create a binding agreement: If there is a clear and unequivocal notice of resignation, an employer should be able to accept and rely on the resignation without doing anything more. It is generally not open to an employee to unilaterally retract an offer to quit once it has been accepted and that acceptance is communicated to the employee by the employer. To minimize the possibility of disagreement or misunderstanding, an employer should "accept" a resignation in writing (and also consider taking a step or action in reliance on it).

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