Assuming An Employee Has Resigned Can Be Costly For Employers

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The decisions in *Johal v Simmons da Silva LLP*, 2016 ONSC 7835 and *Bishop v. Rexel Canada Electrical Inc*., 2016 BCSC 2351, illustrate the risks that employers face in assuming that an employee has resigned.

Generally, if an employee voluntarily resigns from his or her employment, the employee cannot bring an action for wrongful dismissal. However, the law is clear that in order to be a valid and enforceable resignation, the resignation must be "clear and unequivocal". While an employee's actions or words may imply that he or she has resigned, employers must also consider the employee's intentions before relying on the employee's resignation. Recently, the decisions in *Johal v Simmons da Silva LLP*, 2016 ONSC 7835 and *Bishop v. Rexel Canada Electrical Inc*., 2016 BCSC 2351, illustrate the risks that employers face in assuming that an employee has resigned.

In *Johal v Simmons da Silva LLP*, 2016 ONSC 7835, the employee, Ms. Johal, was a senior family law clerk who had been employed by the law firm for 27 years and was responsible for coordinating work for the law clerks at the office. During a meeting, the employer informed Ms. Johal that going forward, another law clerk, who was returning from maternity leave, would be responsible for coordinating the work. As a result of the proposed change, following the meeting Ms. Johal left work early. The following day, Ms. Johal attended the office and removed her personal belongings and later returned her security pass to her employer. The employer did not attempt to contact Ms. Johal. Ms. Johal did not return to work and she did not contact her employer until five days after she had returned her security pass. The employer did not allow her to return to work and it took the position that Ms. Johal had resigned. Ms. Johal subsequently brought an action for wrongful dismissal.

The Ontario Superior Court of Justice reviewed the law on resignation and noted that to determine whether the employee's words or actions equate to a "clear and unequivocal" resignation, they must be determined contextually and the surrounding circumstances are relevant. Further, the Court noted that an employee may resile from a resignation, provided the employer has not relied upon the resignation to its detriment. In this case, the Court noted that Ms. Johal had 27 years of service and when she had dropped off her security pass, the employer did not make any inquiries about what had taken place. Further, the employer did not set up a follow up meeting and the employer also did not attempt to contact Ms. Johal after she returned her security pass. In addition, the Court

noted that Ms. Johal did not provide the employer with any notice of resignation and at no point did she state that she was resigning. Based on the surrounding circumstances, the Court determined that Ms. Johal did not resign. The Court found that, while the employer did not owe a paternalistic duty to Ms. Johal, on the facts of the case, it was required to do more to determine Ms. Johal's true and unequivocal intention. As the Court determined that Ms. Johal did not resign, she was entitled to damages for wrongful dismissal.

In *Bishop v. Rexel Canada Electrical Inc*., 2016 BCSC 2351, the employee, Mr. Bishop, was a buyer in the employer's purchasing department. In December 2015, Mr. Bishop was assigned additional work and he began feeling significantly overburdened by the additional work. At the beginning of the next month, Mr. Bishop's supervisor requested that Mr. Bishop continue to perform the additional work and Mr. Bishop subsequently sent the supervisor an email indicating that he was overburdened and he stated in the email that he "would not be returning". Following the email, Mr. Bishop and his supervisor had a phone call, during which the supervisor confirmed Mr. Bishop's resignation. Mr. Bishop was then escorted from the office and asked to return his keys. Mr. Bishop subsequently brought an action for wrongful dismissal.

The Supreme Court of British Columbia explained the test for resignation and noted that there is an objective and subjective test in determining whether the resignation was "clear and unequivocal". The objective aspect of the test focuses on what a "reasonable employer" would have thought about the intentions of the employee based on what the employee says or does. The subjective aspect of the test takes into account the employee's state of mind and the employee's conduct in relation to that state of mind. This may well include the employee's timely retraction, or attempted retraction of his or her alleged resignation. In this case, the Court was not convinced that there was a "clear and unequivocal" resignation. In finding that Mr. Bishop had not resigned, the Court noted that Mr. Bishop was clearly upset and the employer should not have taken his word as definitive without further inquiry. Further, prior to the alleged resignation, the employer had nominated Mr. Bishop for termination or layoff and the Court noted that the employer saw Mr. Bishop's reaction as a convenient opportunity to terminate his employment. Finally, the Court noted that the employer was in a rush to confirm the resignation. Accordingly, the Court determined that Mr. Bishop had been wrongfully dismissed and was entitled to damages, which included 20 months' payment in lieu of notice.

These cases illustrate the risk employers take in assuming that an employee has resigned. In both cases, the incidents involved emotionally-charged circumstances where the employer failed to consider the surrounding circumstances and failed to determine the intention of the employee. Where the alleged resignation takes place in the heat of the moment, it may not be reasonable for the employer to conclude that the employee has resigned based on the employee's statements alone. In order to minimize the risk of a wrongful dismissal action following a resignation, employers should ensure that the employee's resignation is “clear and unequivocal”. This requires that employers follow up with the employee to clarify or confirm the employee's intention to resign and employers should also request written confirmation of the resignation. Further, as a good practice, employers should provide the employee with an opportunity to resolve the conflict or issue prior to accepting the resignation. While each case must be assessed differently, failing to ensure that the resignation is clear and unequivocal can be costly for employers.

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