“TAKE THIS JOB AND…”: RESIGNATION AFTER *KIERAN (OCA)*

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“If the career you have chosen has some unexpected inconvenience, console yourself by reflecting that no career is without them”.

Jane Fonda

“Don’t simply retire from something; have something to retire to”.

Harry Emerson Fosdick

“What we’ve got here is a failure to communicate”.

Strother Martin as Captain, Road Prison 36
‘Cool Hand Luke’

Resignation is becoming one of the most complicated aspects of employment due greatly to the fact that employers and employees succumb to an endemic weakness--the failure to listen to each other. Resignation as a concept is simple: an employee desires to cease being an employee and therefore advises the employer of his intention to end the employment relationship. End of story? This is not always the case. What if the employee really didn’t mean what he said? What if the employee was speaking out of frustration and was merely making a point or foolishly attempting to solicit a sympathetic ear? What if there are mitigating factors—stress, illness, medication, and emotional upset? Sometimes things are said in the heat of the moment and often with regrettable consequences.

Resignation that is clear and unequivocal should not require the attention of the courts.

When resignation is lost in a cloud of ambiguity, litigation may remove any doubt but at what costs? The law of resignation ought to be simple and straightforward; its application is what triggers the ongoing debate.

The Court of Appeal has addressed the issue of resignation in *Kieran v. Ingram Micro Inc).* Andrew Kieran was a bright and energetic Senior Vice-President, Purchasing, of Ingram Micro Inc. Talented and ambitious, he was a likely candidate to succeed as President of the company. Pending the appointment of a new President, Kieran was appointed as a member of an interim troika labeled “the office of the President” with duties to operate in this capacity until the vacancy was filled. Kieran along with a rival, Gordon Schofield and the Senior Vice President, Finance formed the troika. Kieran and Schofield did not get along. Kieran advised the president of Ingram World Wide that if Schofield was appointed as President of their division, he would prefer an international posting to one of Ingram’s global companies rather than remain working for Schofield. In fact, Kieran said that the appointment of Schofield over him would be a “slap in the face” and that he could not work for Schofield.

Lo and behold, Schofield was appointed President. Kieran offered to continue in his position and magnanimously offered his support to the new President. The international president was of the view that this was not an option and therefore a new global posting was offered to Kieran. The new position included a significant reduction in salary and bonus. Kieran refused the offer. The employer confirmed that they accepted Kieran’s resignation. Kieran left the company.

At Kieran’s trial for his claim of constructive dismissal, the employer was of the view that Kieran’s statements amounted to a resignation due to the fact that he expressed his displeasure with having to work with Schofield. The employer said that it acted to its detriment in attempting to find new employment for Kieran. Furthermore, the employer said that Kieran could not resile from his original position because the company accepted the fact that he did not want to work with the new President and as a result had no choice but to accept this statement as his resignation.

The trial judge found in favour of the employer and dismissed Kieran's claim. The trial judge concluded that Kieran's initial statements amounted to an "unequivocal resignation contingent on the happening of an uncertain future event". The event was the elevation of Schofield as president. According to the trial judge, when that event occurred, the resignation took effect.

The judge also found that the attempt to find Kieran work outside of Canada was tantamount to the employer acting to its detriment. Kieran therefore could not withdraw his resignation; the company had already expended time, money and management in attempting to look for an alternate placement for Kieran.

In a defining manner, the Court of Appeal reversed the decision and found that Kieran had not resigned. The Court of Appeal looked carefully at the trial evidence and concluded that Kieran did not state in plain language that the appointment of Schofield would be the catalyst for his departure. The Court stated that had Kieran done so, such a statement "may have amounted to an unequivocal statement of an intention to resign". What Kieran said was that in the event Schofield became president, he would prefer an international transfer.

Clearly, there is a difference. The Court was concerned with the fact that the circumstances surrounding the resignation—the words, the actions, the steps taken by the parties—when viewed objectively and as a whole must lead to a conclusion that the employee had unequivocally resigned. In the case of Kieran, the Court could not draw this conclusion.

Following a decision in Skidd v. Canada Post Corp., the Court concluded, "a resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign, or there must be conduct evidencing such an intention".

The "clear and unequivocal" test is borne out of necessity. Historically, the employment relationship is one of unequal participants. The employer possesses socio-economic power disproportionate to that of an employee. Therefore, if an employee says that he is resigning, an employer should be clear in his understanding that the employee wishes to discontinue the employment relationship. It may require some active solicitation on the part the employer—an "exit" interview, a telephone call, an informal coffee break—some definite attempt at communication that is clear in its attempt to adduce the true wishes of the employee. Comments made in haste or in an emotional state require a response by the employer that is sensitive to the situation and rational in the overall context. Comments as displayed in *Kieran* may not necessarily require the same degree of sensitivity. They do require some attempt at certainty to ensure clearly and unequivocally that the employee's true intention is to sever the relationship. Words such as, "Are you sure you want to leave the company?" or "Why don't you think about what you are saying and speak to me in the morning" put the issue of resignation squarely on the shoulders of the employee. Should there be second thoughts, then the matter is moot. But if the employee repeats the demand after being given the opportunity to give the issue some thought, then the employer has some protection in the wake of a pending claim by the disgruntled (and misguided) employee.

The court is clearly stating that where there is doubt, a court ought to err on the side of caution and find in favour of the employee. This is certainly consistent with the view that the pendulum has swung in favour of plaintiff/employees. However, it also emphasizes the court's view that an employee cannot have it both ways. When you resign, you resign. A retraction can be accepted but if there is none, the employee must live with the consequences.

At best, the comments made by Mr. Kieran or some similar display of dissatisfaction by an employee ought not to be the catalyst for termination. At best, they ought to be viewed as some impediment to future advancement within the company. In limited circumstances, such comments may be a warning of some greater problem in the workplace. However, they need not be ignored as they offer an employer some evidence of how the particular employee ought to be viewed in the grander scheme of things.

So how should both camps—employees and employers—approach resignation? Here are some practical considerations.

For employees, (1) if you choose to resign, think about what you are doing—seek some advice, preferably from family, an outside mentor and, when possible, a lawyer; (2) if you choose to resign, make sure that it is in clear, articulate and intelligible language; (3) a resignation ought to be in writing so that there is a record; (4) a written resignation should not be delivered the day it is prepared—the "sleep-on-it" rule should apply; (5) a resignation ought to be made to the immediate supervisor; (6) a resignation should be made both verbally and in writing so there is no doubt--an employee owes that much to the employer.

For employers, (1) the acceptance of an employee's resignation should be confirmed in writing; (2) an exit interview should be conducted to determine reasons for the resignation; (3) if the resignation is verbal, a written confirmation by the employer ought to be made; (4) if the termination involves an emotional incident, the

employer ought to calmly pursue the issue with the employee to verify the facts and should do so when convenient and outside the emotional state leading up to the resignation; (5) if there are medical issues, an employee ought to be encouraged to see their physicians or therapists to ensure against issues reaction to prescribed medication or an illness which is affecting the employee's thinking.

In cases where resignation is the issue to be determined, the fundamental impediment leading to crisis is the inability to communicate effectively. Often enough, the challenges that arise in these types of cases focus on irrational or illogical behavior. When legal advice is sought, it is often after the fact. In those rare opportunities when legal counsel is asked to comment at the cusp of a resignation, one has to go back to basics and say, as the Court of Appeal has pronounced, "What would the reasonable person do here?" Regardless of who it is that counsel is advising –employee or employer—the facts and statements revolving around the issue have to be reviewed objectively. In these circumstances, litigation often arises out of frustration and a lack of objectivity and understanding. Counsel can provide a tremendous service to clients in clearly establishing a protocol for interpretation of the events at hand so as to avoid the uncertainty of litigation. In essence, there are vastly more important things over which to litigate than the issue of resignation; however, there is no more important issue requiring reasonable and sensitive counseling than a resignation whose impact on both parties is life altering.

The circumstances when an employee says to an employer that they can "take this job and…" is dependent on the volatility of the employment relationship. In most cases, the reasons why an employee seeks to end the employment relationship should be the subject of a non-confrontational discussion between the parties. The intent of such a discussion requires a meeting of the minds on the subject of resignation—the mirror image of the meeting of the minds when the parties first agreed to be bound by a contract of employment. It is that meeting of the minds –the clear and unequivocal communication of intentions, desires and acceptance—which will pave the road for a harmonious parting of the ways. On the other hand and with the same attention paid to clear and unobstructed communication, a meeting of the minds may also lead to the road not taken and a restoration of stronger employment relationship.

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