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Do you really mean it? Employee resignations and abandonment of employment

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Highlights

Employers should have a plan in place to handle circumstances that arise for when an employee leaves (or is absent from) the company.

Voluntary resignation

- Notice requirements
- Legal test
- “Heat of the moment” resignations
- Constructive dismissal
- Tips for employers

Abandonment of employment

- Legal test
- Disability cases
- Tips for employers
- A note on frustration



Resignation:

“The act of leaving a job or position and making a statement that you are doing this”

Cambridge Dictionary



Dear Boss,
I quit!
Sincerely,

Voluntary resignation

Form of notice

- Ideally, a voluntary resignation from an employee is provided by a letter which includes: a statement of their intention to resign voluntarily from their position and the effective date of resignation.

Voluntary resignation: Notice requirements

Amount of Notice

Alberta (*Employment Standards Code*, RSA 2000, c E-9, s. 58)

- Generally speaking, an employee must give the employer a written termination notice of at least:
 - a) One week, if the employee has been employed by the employer for more than 90 days but less than two years.
 - b) Two weeks, if the employee has been employed by the employer for two years or more.

Federally regulated companies

- No minimum statutory notice requirement for resignation by federally regulated companies (*Canada Labour Code*, RSC 1985, c L-2).

Voluntary resignation: Notice requirements (cont'd)

Expediting a resigning employee's departure:

- Resignation notice that is less than the termination notice that the employer would have been required to give - the employer must pay the employee wages that the employee would have earned had the employee worked regular hours for the remainder of the notice period that had been given by the employee.
- Resignation notice that is equal to or more than the termination notice that the employer would have been required to give - the employer must pay wages that the employee would have earned if the employee had worked regular hours for the remainder of the termination notice period that would have been required to be given by the employer.

Voluntary resignation: Notice requirements (cont'd)

But...

Keep in mind common law or contractual notice requirements.

Voluntary resignation: Notice requirements (cont'd)

Implied reasonable notice of resignation

- At common law, reasonable notice of termination is a reciprocal obligation of both employer and employee; accordingly, employees have implied duties to give reasonable notice of resignation.
 - The rationale is to avoid any disruptive harm or loss/damage to the employer's business (recruit a replacement, avoid competition).
 - A larger employer has more resources at its disposal to hire someone to replace the employee than an employee to find a job.

In ***RBC Securities Inc. v Merrill Lynch Canada Inc.***, 2008 SCC 54 (CanLII) investment advisors were ordered to pay damages of \$40,000 representing the amount of profits they would have contributed to their former employer during the (implied) 2.5 week resignation notice period.

Voluntary resignation: Notice requirements (cont'd)

Contractual notice of resignation

- A term of reasonable notice should not be implied where an employment contract specifies the notice period for resignation.

Voluntary resignation: Legal test

Was the resignation voluntary?

- If an employee voluntarily resigns from his or her employment, rather than being dismissed, the employee cannot bring a wrongful dismissal action: see for example, *Carroll v Purcee Industrial Controls Ltd.*, 2017 ABQB 211 (CanLII) at para 25 [**“Carroll”**].

Voluntary resignation: Legal test (cont'd)

Legal test

- A finding of resignation requires the application of both a subjective and objective test: (1) did the employee intend to resign and (2) did the employee's words and acts, objectively viewed, support a finding that they resigned.
 - The subjective aspect of the test considers the employee's state of mind as well as the employee's conduct in relation to the state of mind; considerations include whether there was an attempted retraction of the resignation.
 - The objective aspect of the test asks what a "reasonable employer" would have thought about the intentions of the employee based upon what the employee said or did. Consideration must be had to the surrounding circumstances and context.
- See *Carroll*, supra, at para 25.



Heat of the moment resignations

“I quit!” Resignation or Dismissal?

“The law is clear that where an emotionally upset and angry employee exclaims “I quit”, the issue of whether he/she has resigned is not clear cut. The law recognizes that such utterances may not constitute a valid resignation. Nor should such a declaration be accepted without question by the employer.

Rather the onus is on the employer to not accept such a spontaneous declaration without proper deliberation.”

Robinson v Team Cooperheat-MQS Canada Inc. (2008 ABQB 409) (CanLII) at para 52 [**“Robinson”**], citing *Lelievre v Commerce and Industry Insurance Company of Canada*, 2007 BCSC 253 (CanLII) at para 52.

Resignation: 'Heat of the moment' resignations

Robinson (2008)

- Mr. Robinson, 62-year old sales manager, employed by the company for 30 years. Three employees made allegations of improper conduct against Mr. Robinson.
- Mr. Robinson called into a meeting to address the allegations. During the meeting, Mr. Robinson stated something to the effect of he would be forced to resign if the allegations were not withdrawn.
- Following day, Mr. Robinson returns to work and advises that he had no intention to resign. Mr. Robinson continues to report for work.
- Employer was of the view that the employee resigned and sent employee a memo to that effect.
- Mr. Robinson brought a claim for wrongful dismissal.

Resignation: 'Heat of the moment' resignations (cont'd)

Robinson (2008)

- Court determined that Mr. Robinson did not resign and that he was wrongfully dismissed.
- Key factors the court considered in arriving at the conclusion that there was no voluntary resignation:
 - a) Words used during the meeting were not “clear and unequivocal”. He was expressing a future intention to resign that was conditional upon the allegations not being withdrawn.
 - b) During the meeting, Mr. Robinson was shocked and caught off guard. This was the first time in 30 years that he had been accused of being a “bad manager”. His reaction was a spontaneous and emotional outburst.
 - c) The next day, Mr. Robinson attempted to retract his resignation.
 - d) Mr. Robinson had no say in the date of his last day of service. This was inconsistent with a voluntary resignation.

Resignation or constructive dismissal?

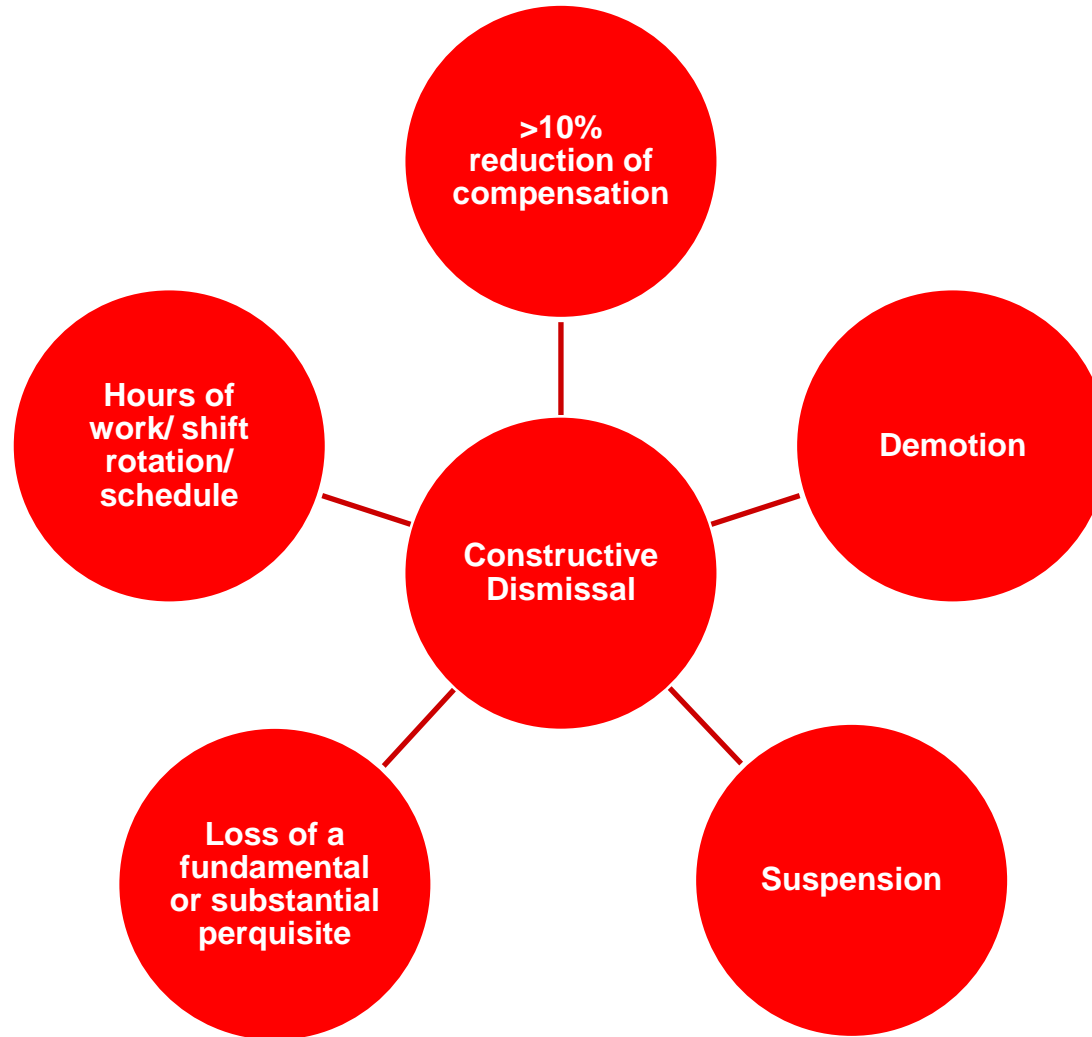
Potter v New Brunswick Legal Aid Services Commission, 2015 SCC 10 (CanLII)

- Constructive dismissal can take two forms: that of a single, unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer intended to no longer be bound by the contract.
- The first branch of the test for constructive dismissal, requires a review of specific terms of the contract, and has two steps:
 - a) The employer's unilateral change must be found to constitute a breach of the employment contract.
 - b) If it does not constitute such a breach, it must be found to substantially alter an essential term of the contract. At this stage the court must ask whether, at the time the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.

Resignation or constructive dismissal? (cont'd)

- An employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable.
- This approach requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention to no longer be bound by the contract.
- In all cases, the primary burden will be on the employee to establish constructive dismissal.
- Typically the employee will quit and claim constructive dismissal.

Examples of changes that could lead to a constructive dismissal claim



Resignation: Tips for employers

1. Check the employment agreement for any requirements relating to notice for the resignation (as well as any post-employment obligations).
2. Consider whether there is anything about the circumstances, including the employee's words or acts that may undermine a finding that he or she voluntarily resigned:
 - a) Was the employee upset for any reason?
 - b) Was there a fundamental change to a term of employment?
 - c) Did the employee attempt to retract the resignation?
 - d) Is there any ambiguity about what the employee's intention is?
3. Confirm the resignation in writing:
 - Verbal notices of resignation are not always clear. If an employee is resigning, ask them to confirm in writing that: (i) they are voluntarily resigning; and (ii) specifying their last day of work.
 - Having proper documentation clearly showing that the employee voluntarily resigned can help to avoid costly litigation down the road.



Abandonment:

“It is an implied term of every employment contract that an employee attend at work, and that he is only excused from that obligation where he has the employer’s permission or is unable to report for work.”

Pereira v Business Depot Ltd. (2009 BCSC 1178)
(CanLII)





Abandonment

Legal test

- “Abandonment occurs when the **employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment...** For example, it is an implied term of every employment contract that the employee attend work, so an employer may take the position that the employee has abandoned their employment if they fail to attend work for an extended period without reasonable excuse or explanation.” *Carroll*, supra (emphasis added).
- “While an actual resignation must be clear and unequivocal, the test for abandonment is similar to the test for resignation: **do the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract.**” *Betts v IBM Canada Ltd.*, 2015 ONSC 5298 (CanLII) [**“Betts”**] (emphasis added).

Abandonment (cont'd)

Betts (2015)

- The Ontario Superior Court of Justice upheld an employer's decision to terminate an employee's employment for abandonment of employment or voluntary resignation where the employee (1) was absent from work for eight months; (2) failed to submit necessary documentation to support an application for short-term disability; and (3) failed to return to work despite multiple written warnings from the employer.
- The employee was employed in New Brunswick. As a regular full-time employee, Betts qualified for IBM's STD Plan. Betts had suffered from major recurring depressive disorder and an anxiety disorder. He availed himself of IBM's STD Plan in 2008 and took leave in order to seek treatment and recover from his symptoms. He followed the necessary steps in seeking leave from work.

Abandonment (cont'd)

Betts (2015)

- In October 2013, after the passing away of Bett's father, he suffered another depressive episode. As a result of the depressive episode, he ceased reporting to work on October 13, 2013. He reported his absence to his manager and advised his manager that his leave would extend beyond ten days. Manulife (IBM's benefits provider) was informed of Bett's absence. The employer sent Betts a letter dated October 22, 2013 which advised him that the STD Plan required a Manulife case manager to approve his absence from work.
- On October 30, 2013, Manulife sent Betts a letter requesting that he contact Manulife by November 5, 2013 to submit the necessary forms (which were enclosed) including an "employee declaration" and "attending physician's statement".
- After this, IBM sent five additional letters to Betts, informing him of his options and the consequences of not complying with IBM's Plan requirements. IBM's Plan requirements were that Betts had to submit necessary medical documentation or that he would be held to have voluntarily resigned from his employment. Mr. Betts failed to submit such information.

Abandonment (cont'd)

Betts (2015)

- Betts sent IBM a letter from a non-physician, Dr. Nixon, which essentially reiterated Betts' self-reported symptoms. It further wrote: “[Mr. Betts has requested a job transfer to Ontario due to existing problems with current manager...this would be very beneficial to his recovery. Also, he is in a serious relationship with a partner who lives in Mississauga [Ontario].”
- The letter from Dr. Nixon did not meet IBM's requirement as Dr. Nixon was not a physician. However, taking into account Dr. Nixon's statement, IBM found a new manager for Betts.
- Throughout his absence from work, Betts consistently missed necessary deadlines to submit sufficient documentation or to file appeals. Furthermore, he relocated from New Brunswick to Ontario to live with his fiancée without advising IBM of his move.
- Having not received the requisite and clearly outlined information, and having extended deadlines for Betts on numerous occasions, IBM took the position that Betts had resigned from his employment. Betts then brought a claim for wrongful dismissal.

Abandonment (cont'd)

Betts (2015)

- The employer relied on three objective factors, which taken singularly or collectively, confirmed that the employee abandoned (or resigned) from his employment:
 - a) A failure to report to work and fulfill his employment obligations for over 8 months (including a failure to heed the various warnings in the five option letters);
 - b) A failure to follow the policies and procedures set forth in the STD Plan regarding applications for short term disability and appeals therefrom; and
 - c) A voluntary and undisclosed relocation from New Brunswick coupled with his lack of intention to return to New Brunswick and resume his employment with the employer.
- The court agreed with the employer and held that such factors are indicia that the employee abandoned his employment.

Abandonment (cont'd)

Betts (2015)

- While there was no doubt that the employee suffered from depression and anxiety disorders, the employee was well aware of what was required of him.
- An employee suffering from medical issues is not immune from being found to have abandoned his/her employment.
- A failure to follow proper directives and requirements of the employer can be akin to disobedience, which would normally justify dismissal.
- To the extent that an employee holds the position that his medical condition itself precluded him from complying with the employer's requirements, there needs to be medical evidence supporting such position.

Abandonment (cont'd)

Lippa v Can-Cell Industries Inc., 2009 ABQB 684 (CanLII)

- The employee, who had worked for the employer for approximately 10 years left work due to medical problems, including the possibility of MS. The employer was aware that the employee was attempting to obtain short term disability benefits from its group plan insurer. The employee's initial application for benefits was dismissed, although settlement was reached some years later.
- The employee was terminated for abandoning her employment after five months elapsed. The employee testified that it was always her intention to return to work, and that she had not abandoned her position with the employer at any time prior to receiving her notice of termination.
- The court accepted the employee's version of the facts, while noting that communications between the parties during this period could have been better.
- The employer did not make any inquiries to obtain an update on the employee's medical status and such inquiries are consistent with the employer-employee relationship.

Abandonment: tips for employers

1. Employer has an obligation to make inquiries and communicate with the employee before presuming the employee abandoned their employment.
2. Be cautious in relying on disability insurer's assessment of whether employee is unable to return to work – obtain information directly from employee.
3. In communication with an employee who is able to work, provide a clear date of expected return to work and identify consequences of a failure to return to work.
4. Document all communications (including attempted communications).
5. Prepare and implement attendance and/or absence policies that define attendance expectations and permitted absences and establish clear expectations for communications with employer and any supporting information to substantiate a basis for the absence.

Frustration



Frustration

Legal test

“In relation to employment contracts, where an employee is unable to work because of a disabling illness, the doctrine applies because the permanent disability renders performance of the employment contract impossible, such that the obligations of the parties are discharged without penalty. If there is a frustration of contract, the termination is said to be by law, or automatic. Nothing need to be done to terminate the contract...Frustration applies where an employee is absent from work, as a result of illness or disability, for a period deemed long enough that a court will accept that the employment contract has come to an end”: *Fraser v UBS*, 2011 ONSC 5448 (CanLII) [***Fraser***].

Frustration (cont'd)

Fraser (2011)

- Fraser was employed by UBS for 20.5 years. She started working on November 3, 1988 when she was 20 years of age. After a holiday in 2005, she became ill. She was off work for six months on STD, from December 2005 until July 2006, by which time her illness had evolved into major depression and anxiety phobia.
- She returned to work on a trial basis, from July 2006 until October 2006 and then took an additional six-month period on STD until April of 2007. During this time, UBS requested that there be an independent medical assessment. This assessment was done in January of 2007. The prognosis by Dr. Kerin was that she was fit to return to work on a graduated basis.
- She was unable to return to work at the end of the second STD period, and in April 2007 she applied for LTD with her company's insurer, RBC insurance.

Frustration (cont'd)

Fraser (2011)

- RBC Insurance approved Fraser for LTD benefits and paid these from March 2007 to the end of January 2009. During this time, UBS received periodic copies of Fraser's disability status.
- RBC Insurance terminated Fraser's LTD benefits on January 31, 2009 on the basis that she did not follow medically recommended treatment to assist in her recovery or at least did not provide proof of such as required under the policy.
- During this time, and thereafter, Fraser did not advise UBS of any change in her medical prognosis. She did not return to work and did not indicate that she had ceased receiving medical treatment for disability.
- On June 5, 2009, UBS advised Fraser by way of letter that her employment had terminated due to having had no communications with UBS about her return to work and stated that it assumed that Fraser did not wish to return to work (resignation) or that Fraser continues to be totally disabled (frustration).

Frustration (cont'd)

Fraser (2011)

- The Court concluded that Fraser had been off work for 3.5 years, was totally disabled and there was nothing to indicate any likelihood of being able to return to work within a reasonable time. Accordingly, there was a frustration of the contract that ended the employment of Fraser without obligation on the part of the employer to provide notice of pay in lieu of notice.



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The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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