

EMPLOYMENT LAW CONFERENCE—2012

PAPER 5.1

Resignations

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RESIGNATIONS

I.	Introduction.....	1
II.	What Conduct is Sufficient Evidence of an Intention to Resign?	2
	A. Conduct Amounting to a Resignation.....	2
	B. Conduct Not Amounting to a Resignation	3
III.	What Must an Employer Do to Accept a Resignation?	4
IV.	What Conduct Could Constitute a Deemed Resignation?.....	8
V.	The Issue of Voluntariness	12
VI.	How Does an Employee’s Mental State Affect the Validity of a Resignation?.....	15
VII.	What is the Effect of Retracting a Resignation?.....	16
VIII.	Resignations under the Employment Standards Act.....	16
	A. Onus	16
	B. Standard of Proof.....	16
	C. Legal Test for Resignation under the Act	16
	D. Objective Element of the Test	17
	E. Subjective Element of the Test.....	17
	F. Notice of Resignation by Employee	17
IX.	Resignations under the Employment Insurance Act.....	17
	A. The Legislative Regime	18
	B. Two-Step Analysis	19
	C. Voluntarily Leaving.....	19
	D. Constructive Dismissal	20
X.	Conclusion	21

I. Introduction

This paper is intended to provide an overview of the substantive issues relating to the law of resignation with a particular focus on British Columbia cases. First, we review the type of evidence that will be required to establish an intention to resign and the type of evidence which will fall short. Subsequently, we consider some of the specific issues that arise in disputes between employers and employees around resignations. Specifically, we consider the following issues:

- what employers must do to accept a resignation;
- what conduct on the part of an employee may constitute a deemed resignation;
- the issue of voluntariness;
- the impact of an employee’s mental state on a resignation; and
- the effect of retracting resignations.

Finally, we review the treatment of resignations under the *Employment Standards Act*, 1996 R.S.B.C., c. 113 and the *Employment Insurance Act*, S.C. 1996, c. 23.

II. What Conduct is Sufficient Evidence of an Intention to Resign?

In a case of an alleged resignation, the test is whether a reasonable person would have understood, by the plaintiff's statements and actions, that he or she had resigned (*Assouline v. Ogivar Inc.*, [1991] B.C.J. No. 3419 (S.C.) (Q.L.) at [page 3, QL version]). The test is an objective one (*Assouline* at [page 4, Q.L. version]).

To be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear (*Danroth v. Farrow Holdings Ltd.* (2005), 47 B.C.L.R. (4th) 56 (C.A.) at para. 8).

Like many legal principles, the principles regarding the evidence required to establish an intention to resign are easy to state, but difficult to apply. Consequently, a challenging aspect of the law of resignation is determining whether the particular facts of a case amount to an unequivocal resignation on the part of an employee.

A review of the case law relating to resignations is instructive in determining the type of conduct that will establish an unequivocal intent to resign and the type of conduct which may fall short. As such, prior to considering some of the specific issues relating to the law of resignation, we review, below, some of the facts from decided resignation cases in BC. These examples are not intended to be exhaustive, but merely illustrative.

A. Conduct Amounting to a Resignation

- The following conduct, taken together, was found to constitute evidence of a resignation, despite the employee's repeated retractions of an oral resignation made during an emotional outburst:
 - the plaintiff's failure to provide satisfactory medical evidence despite allegedly being on sick leave;
 - the plaintiff's statement that she did not know when she would be back and subsequent demands for overtime and sick leave payouts;
 - the plaintiff's failure to return to work following her emotional outburst;
 - the plaintiff's request for a good reference letter;
 - the plaintiff's refusal to meet with the defendant to discuss what had happened or explain her resignation; and
 - the plaintiff's cleaning out of her office prior to her oral resignation and subsequent failure to request any items left at the office (*Brooks v. Vernon Women's Transition House Society*, [2004] B.C.J. 2694 (S.C.) (QL)).
- An employee who left her key at her work station then walked out of the office after an argument with her employer, later left "foul and crude messages" on her employer's message machine, and never returned to work was found to have resigned. There was evidence the plaintiff believed she had been or was about to be fired, and the court held that the plaintiff's failure to wait until she was clearly and unequivocally dismissed was fatal to her claim (*Almack v. Dr. Michael E. Pezim Inc.*, [2004] B.C.J. 983 (S.C.) (QL)).
- An employee's refusal to follow his employer's instructions and the employee's statement that "If you don't like the way I do business, I will quit," along with the employee's immediate departure on an unapproved three week vacation, amounted to an ultimatum that constituted a resignation capable of acceptance by the employer, despite the employee's statement a few days later that he was not going to quit but would have to be fired (*Billows v. Canarc Forest Products Ltd.*, [2003] B.C.J. 2064 (S.C.) (QL)). On the issue of ultimatums amounting to resignations, see also *Kirby v. Amalgamated Income Limited Partnership*, [2009] B.C.J. 155 (S.C.) (QL) and *Grewal v. Khalsa Credit Union*, [2011] B.C.J. 925 (S.C.) (QL) at 97.

- An employee who became upset at a meeting criticizing her performance and asking the employer representatives at the meeting if she was dismissed was found to have resigned when she left the meeting demanding her final pay cheque prior to receiving a reply to her question about dismissal (*Osachoff v. Interpac Packaging Systems Inc.* (1992), 44 C.C.E.L. 156 (B.C.S.C.)).

B. Conduct Not Amounting to a Resignation

- Where it was the end of a workday and the plaintiff was due to start a previously scheduled and authorized vacation, a statement by the plaintiff to the effect of “I’m out of here” was ambiguous and not a clear statement of an intention to resign (*Balogun v. Deloitte & Touche, LLP*, [2011] B.C.J. 1839 (S.C.) (QL)).
- A plaintiff’s month long absence from work after losing her home in a fire and telephone call to her employer to say she would not be coming to work and was not sure when she would be returning did not amount to a resignation despite the fact that the employer had no way to contact the employee for the month of her absence (*Beggs v. Westport Foods Ltd.*, [2010] B.C.J. 1135 (S.C.) (QL) var’d on other grounds 2011 BCCA 76).
- A verbal statement by the employee to her supervisor that she was quitting and would not be returning was not found to be a resignation in light of the surrounding circumstances, including:
 - the plaintiff’s statement that “she couldn’t take it any more,” which should have raised some question in the supervisor’s mind whether the plaintiff had merely expressed emotional distress and frustration;
 - the fact that the plaintiff had made similar statements about stress and quitting in the past;
 - the supervisor’s awareness of the plaintiff’s personal life stresses;
 - the plaintiff’s statement within 24 hours that she “had not quit”; and
 - the supervisor’s belief that it would be “out of character” for the plaintiff to quit without notice (*Bru v. AGM Enterprises Inc.*, [2008] B.C.J. 2380 (S.C.) (QL)).
- An employee’s expression of an intention to speak to a lawyer in response to an employer’s “accept it or not” proposal regarding changes to the plaintiff’s job was not a clear act of resignation (*Hainsworth v. World Peace Forum Society*, [2006] B.C.J. 1167 (S.C.) (QL)).
- An employee’s claim (to his employer) of constructive dismissal, and to severance pay did not constitute evidence of an intention to resign (*Danroth* at para. 9).
- An employer attempted to have his employees sign new employment contracts. In response, each of the employees sent a memo declining the changes to their employment terms and stating that they would continue to work provided no changes were made to their employment relationship. When the employer failed to respond to these memos, the employees delivered a follow-up joint memo stating their understanding that the employer intended to change their employment terms and unless he advised them otherwise in writing by the end of business, they would “proceed accordingly.” The Court found that viewed objectively, the second memo did not constitute a clear, unequivocal resignation (*Pollock v. First Heritage Financial Planning Ltd.*, [2002] B.C.J. 2511 (S.C.) (QL)).
- The delivery by an employee of a resignation letter and office key to an employer would have been an unequivocal resignation *but for* the surrounding circumstances, namely an ensuing prolonged, emotional and ambiguous conversation between the parties following which the defendant thought the plaintiff had maintained her desire to resign and the plaintiff thought that she was going to continue in her employment (*Maguire v. Sutton*, [1998] B.C.J. 138 (S.C.) (QL)).
- Where an apparent resignation was made in “a spontaneous outburst of anger” and accepted without proper deliberation, the court found that the plaintiff did not have a true intention to resign (*Cox v. Victoria Plywood Co-Operative Assoc.*, [1993] B.C.J. 2788 (S.C.) (QL)).

- An employee's expression of his intent to retire at an unspecified future time was found not to be a resignation (*Tolman v. Gearmatic Co.*, [1986] B.C.J. 481 (C.A.) (QL)). See also *Boykiw v. Clarkes Recognition Products Ltd.*, [2004] B.C.J. 459 (S.C.) (QL), where Ross J. adopted the following statement from *Assouline* at para. 32 "A statement of future intention is not a resignation."

III. What Must an Employer Do to Accept a Resignation?

A completed, voluntary act of resignation includes an offer and acceptance, or clear conduct so implying. Ambiguous actions by either party can taint the transaction and render it incomplete. See *Maguire v. Sutton*, (1998), 34 C.C.E.L. (2d) 67 (B.C.S.C) at paras. 50 and 54-55.

Based on this, it is important to eliminate any ambiguity or misunderstandings so as to ensure that the intent of the parties has been clearly communicated and understood by both the employer and employee involved in the communications.

The decision in *Maguire* illustrates the importance of eliminating ambiguity that may arise from communications between employer and employee in emotionally charged circumstances. In that case, the plaintiff was a receptionist with management duties of the defendant's dental practice. The defendant regarded the plaintiff as a highly valued employee and also as a friend.

In 1995, the defendant retained a consultant to review his practice and make suggestions for improvement. However, the plaintiff reacted badly to the consultant's suggestions as they related to her role and believed that the changes recommended by the defendant constituted a unilateral and fundamental change in her duties (i.e., a constructive dismissal).

The defendant reacted to a particular change by writing a letter of resignation which she delivered to the defendant at his home along with her office key. Upon receiving the letter and the key, the plaintiff and the defendant engaged in a lengthy and emotional conversation, the result of which was that plaintiff believed she had been given a few days off and the defendant believed the plaintiff had resigned. Both parties acted in accordance with their respective beliefs.

At a second meeting the following day, the defendant said to the plaintiff he believed they should, "part company." The plaintiff accepted those words as a dismissal and did not return to work.

The Court found that, although the resignation letter provided by the plaintiff to the defendant was "the product of an emotional and stressful weekend for the plaintiff," it could not be characterized as a "spontaneous outburst" that would undermine "its essential voluntariness." As such, had the plaintiff and the defendant not engaged in the subsequent conversation, the plaintiff's resignation would likely have been considered to be a valid one which the court would have upheld.

However, the ambiguity of the parties' subsequent conduct "tainted" the completeness of the legal act of resignation. The Court concluded that, while the plaintiff started to resign, she never unequivocally and clearly did so and the employer's later statement about going their "separate ways" amounted to a dismissal.

Similarly, in *Bru v. AGM Enterprises Inc.*, [2008] B.C.J. 2380 (S.C.) (QL), the BC Supreme Court discussed the obligations on an employer in cases where the circumstances surrounding a putative resignation involved some potential misunderstanding.

In *Bru*, the plaintiff was a deli clerk at the Mediterranean Market in Kelowna, BC. After two and a half years of employment at the market, the plaintiff was called in by her manager to discuss a conflict that had developed between her and another deli clerk.

The plaintiff became upset during the meeting and requested permission to go home for an hour. Within the hour, the plaintiff called the manager and told him she was not well enough to return to work for the rest of the day. The plaintiff's next scheduled date to work was two days later on

5.1.5

November 12, 2007. However, she did not show up for her shift and then called the deli supervisor on November 13, 2007. Despite contradictory testimony regarding the November 13 telephone conversation, the Court concluded that the supervisor heard correctly that the plaintiff had said, “I can’t take it any longer and I am quitting.”

The supervisor did not ask any questions to determine if the plaintiff truly meant what she said or was simply voicing a frustration.

On November 14, 2007, the plaintiff called her manager and asked if she still had a job. The manager said she had quit and had been replaced. The plaintiff denied quitting. On November 19, 2007, the plaintiff received her final pay cheque and record of employment.

The Court determined that the plaintiff did not clearly and unequivocally resign from employment with the defendant. It found that the defendant “simply stopped up its ears and refused to pay any regard to what the plaintiff was saying.” It described the defendant’s conduct, after the plaintiff’s initial statement, as a “hear nothing, see nothing, speak nothing response” and as ignoring the plaintiff as she tried to clarify her intentions.

The Court stated that when it became clear that there was a misunderstanding, the employer could not rely on the plaintiff’s previous comments and ignore the surrounding circumstances, including her plea she had not quit.

The Court noted that, to deal with a resignation reasonably and fairly, an employer must clarify the employee’s intention. Further, the Court made the following instructive comments:

The central point is this: when it was clear that there was some kind of misunderstanding, the defendant could not just stand on the black letter utterances on November 13, and ignore all the surrounding circumstances, including Ms. Bru’s plea she had not quit (which was implicitly at least a request to review and discuss). Given the Market’s need for Ms. Bru’s services and Ms. Bru’s need of her job, it is doubtful the parties would have held in reasonable contemplation a response from the employer that harmed both parties. [at para. 118]

Similarly, in *Balogun v. Deloitte & Touche, LLP*, [2011] B.C.J. 1839 (S.C.) (QL, the Court placed the onus on the employer to clarify the employee’s true intention prior to relying on conduct that the court considered unequivocal. In that case, the plaintiff had worked for the defendant as a tax manager for seven and one-half months. The defendant refused to give the plaintiff a pay raise after six months because the defendant felt that his job performance did not justify a raise.

The defendant had raised several concerns about the plaintiff’s job performance and, at a subsequent meeting, the plaintiff stated that no one in the office was capable of properly evaluating his work and that he was out of there. The defendant took this statement to mean that the plaintiff was quitting. The plaintiff argued his words meant he would leave for his previously scheduled vacation. When the plaintiff returned from his vacation, he found his record of employment at home indicating that he had quit his position. The defendant denied that the plaintiff was terminated and argued that the plaintiff resigned. The Court had the following to say about whether the plaintiff had quit or had been dismissed:

[34] I find that the plaintiff likely did say something to the effect of “I’m out of here,” but in the circumstances that statement was ambiguous and not a clear statement of an intention to resign. That ambiguity was not, in my view, overcome by the fact the plaintiff turned in his computer and keys as requested. In hindsight, the plaintiff should perhaps have realized that this request was not consistent merely with the fact he was leaving on vacation and should have asked why it was necessary. However, I cannot fault him for failing to fully consider the implications of that request, given the emotional and somewhat angry circumstances and the fact that he was in a hurry to get to the airport.

5.1.6

[35] *I find that Mr. Buchan and Mr. Fichtner, although they believed the plaintiff had resigned, recognized the ambiguity in the situation when they discussed requesting a letter of resignation.* Mr. Fichtner testified that requesting such a letter would be the normal practice and I find that normal practice existed for the very purpose of clarifying situations such as this. It was not followed on June 16 because the plaintiff left the office, but there has been no satisfactory explanation of the defendant's failure to follow the matter up with a later request by letter or telephone message.

[36] *Instead of asking the plaintiff to confirm his resignation and eliminate any uncertainty, the defendant simply sent the record of employment to the plaintiff and to Service Canada.* Although neither Mr. Buchan nor Mr. Fichtner said anything on June 16 that amounted to or was intended to amount to a notice of termination, the subsequent delivery of the ROE clearly communicated to the plaintiff that the employer considered the employment relationship to have ended.

Thus, the Court made it clear that the employer ought to have confirmed the plaintiff's intention rather than proceeding with the severance of the employment relationship on the basis of the plaintiff's equivocal conduct during a heated exchange.

Again, in *Haftbaradaran v. St. Hubertus Estate Winery Ltd.*, 2011 BCSC 1424, the Court confirmed the importance of taking steps to confirm the plaintiff's intent prior to ending the employment relationship.

In that case, the plaintiff began work for the defendant winery in May 2008. The plaintiff was born in Iran and raised in Germany and had a background and a degree in viticulture. He started working for the defendant as a cellar hand and was quickly promoted to winemaker.

A dispute arose between the defendant's principals and the plaintiff in October 2009 after the plaintiff took a day off without permission during the busy harvest season. As a result of this, a confrontation ensued in which the plaintiff became emotional and broke down. Subsequently, the plaintiff made a series of demands to the defendant for an increase in pay and other benefits.

The defendant agreed to give the plaintiff a pay raise as well as additional pay for consulting work. In April 2010, the plaintiff and the defendants had another emotional altercation which culminated in the plaintiff placing his keys on his employer's desk and leaving the winery. The principals of the defendant discussed the plaintiff's behaviour later that day. One of the principals described the plaintiff as having had "another of his hissy fits." When the principals of the defendant learned that the plaintiff had left the property, they began to wonder if the plaintiff was serious in his wish to leave the defendant's employment. Instead of clarifying with the plaintiff what his intentions were, one of the principals, sent the following email to the plaintiff later the same afternoon of the outburst. The email, which is reproduced at para. 39 of the judgment, read:

Hi Hooman

I just like to recap this morning's discussion in regards of your position at our winery.

As discussed we have to plan your departure from our company in order to clean up all the loose ends.

We hope this should be possible within the next 4 weeks.

Please let us know if this will work for you or if you will leave us before this time?

Failure to respond by April 9, 2010 12:00 noon will let us to believe that you have already resigned your position at our winery.

The Court concluded that the plaintiff's conduct was equivocal regarding his intent to resign. In this regard, the Court stated:

The exchange between the plaintiff and Andy Gebert on April 7, 2010, was equivocal as it related to the issue of resignation or termination. I find that the plaintiff wanted the

5.1.7

defendant to be more effusive in its praise of the plaintiff's efforts and to be more deferential to his opinion. Daring Leo Gebert to fire him had worked to a limited degree for the plaintiff in the past; I find that by leaving his keys on the desk and by saying words to the effect of "good luck making wine" the plaintiff was trying the same gambit on April 7th. Quitting the property that day showed extremely poor judgment on the plaintiff's part, but a reasonable observer would see that action as simply another element of his strategy. *I find that the plaintiff's words and actions that day did not amount to an unequivocal expression of resignation from his employment.* [at para. 52]

The Court concluded that given the equivocal nature of the exchange between the defendant and the plaintiff, the defendant's subsequent email constituted a dismissal. In this regard, the Court stated:

The defendant's e-mail to the plaintiff later in the day on April 7th did, however, change the parties' relationship. *Had St. Hubertus genuinely wanted the plaintiff to continue to work as its winemaker, that e-mail would have referred to the earlier conversation, would have acknowledged the ambiguity of the parties' positions when the meeting ended, and would have invited the plaintiff to return to the winery to iron out their differences. Instead, the e-mail spoke unequivocally of the parties' working relationship coming to an end. The e-mail made no offer of, and left no room for the plaintiff to participate in, rapprochement.* A reasonable observer, knowing what had passed between the parties earlier in the day, would have viewed the e-mail as a communication of the defendant's decision to no longer put up with the plaintiff's behaviour. The e-mail terminated the plaintiff's contract of employment with the defendant. The defendant did not assert that it had legal cause to fire the plaintiff. It follows that the defendant failed to provide the plaintiff with adequate notice of his firing, that failure was a breach of an implied term of the employment contract, and the plaintiff is entitled to damages for that breach. [at para. 58] [emphasis added]

Thus, the Court confirmed that an employer that acts on equivocal conduct and takes steps to end the employment relationship in reliance on such conduct exposes itself to a significant risk of being found liable for a dismissal.

In order to clarify ambiguity or misunderstanding and determine an employee's true intention, it may be necessary to wait until tempers have cooled. The decision in *Cox v. Victoria Plywood Co-Operative Association*, [1993] B.C.J. 2788 (S.C.) (QL) demonstrates that acting hastily and accepting an employee's resignation when it has been tendered in anger may be construed as a dismissal.

In *Cox*, the plaintiff had been employed by the defendant for 36 years and was a key executive in the mill's management.

Prior to the events leading up to the dispute in this case, the plaintiff had a difficult relationship with two of the defendant's directors. A situation arose over the locking-out of a core saw which led to a heated exchange which ended with the plaintiff saying to one of the directors that if he thought he could run the mill better than he, the plaintiff, could, then he should do so.

The plaintiff then found his assistant and handed over the operation of the mill to him. He says that he may have told his assistant that he was quitting his job. The assistant on the other hand, gave evidence that he in fact did so. In his examination for discovery, the plaintiff acknowledged that he told several people that he was leaving.

Having handed over the operation of the mill to his assistant, the plaintiff went to the chairman of the directors, who was working on the veneer lathe and told the chairman that he was fed up with some of the millwrights and with interference on the part of some of the directors, and that the chairman would have to get someone else to run the mill. The chairman's evidence was that the plaintiff declined to discuss the matter with him, and left for his home. The plaintiff did not dispute that evidence, and agreed that he told the chairman that the directors would have to get someone else to run the plant.

Shortly after the plaintiff's exchange with the chairman, the directors convened an emergency meeting and concluded that the plaintiff had tendered his resignation and they were accepting it. They subsequently asked one of the directors, Mr. McKay, to inform the plaintiff of this fact.

Mr. MacKay telephoned the plaintiff at his home and arranged to meet him for lunch. At this meeting Mr. MacKay told the plaintiff of the directors' decision (i.e., to accept the plaintiff's resignation) and the plaintiff, who was calmer told Mr. MacKay that he would have liked to talk about it. The plaintiff's evidence was that he had calmed down and was prepared to talk things over and wanted to return to work.

In determining whether the plaintiff had voluntarily resigned or had been dismissed, the Court concluded that the employer acted hastily in accepting the plaintiff's employment and ought to have waited until tempers had cooled to speak to the plaintiff. Specifically, the Court stated at paras. 14-18:

[14] In this case, what would a reasonable board of directors have understood as to the plaintiff's intention on the information given to them by those (including the chairman) who had heard what the plaintiff said in the heat of a moment's irritation?

[15] As I have said, the directors met very soon—within two hours—of the conversation between the plaintiff and the chairman, Mr. Pagely: and the directors did not themselves hear the plaintiff, or question him as to what he meant. They did hear Mr. MacKay's views on what they could do, and they discussed these before coming to the decision to accept his apparent resignation.

[16] Was this the action of a reasonable board of directors? It would, I believe, have been wiser for them to have waited until tempers had cooled and then have heard what the plaintiff had to say. The board, in my view, acted rather hastily in the circumstances.

[17] I am satisfied, and find, that the plaintiff's apparent resignation was made in "a spontaneous outburst of anger," to use the phrase employed by Davidson J. in *Widmeyer v. Municipal Enterprises Ltd.* (1991), 36 C.C.E.L. 237: and it was accepted without proper deliberation by the directors, some of whom were, according to Mr. Cox's affidavit and as I find, not friendly towards him.

[18] In the result, I conclude that Mr. Cox did not truly intend to resign from his lengthy employment, and was in fact dismissed.

The case law suggest that when a resignation is based on equivocal conduct, surrounding circumstances which indicate a contrary intent and/or conduct which may be unequivocal but may be the product of momentary anger, an employer should ensure it takes any necessary steps to clarify the employee's true intent. This will usually involve waiting until tempers have cooled and engaging in further communication with the employee to confirm his or her intent prior to ending the employment relationship.

IV. What Conduct Could Constitute a Deemed Resignation?

It is trite law that it is an implied term of every employment contract that an employee must attend at work. When an employee fails to comply with that term he or she will be taken to have abandoned (i.e., repudiated) the contract, entitling the employer to treat the contract as being at an end.

However, based on a review of the case law relating to deemed resignations, employers are well advised not to precipitously dismiss employees who are absent without leave or out of touch with the employer. In cases of deemed resignations, the courts seem to require employers to clarify the facts around an employee's absence or lack of communication prior to taking steps to end the employment relationship in the absence of a clearly expressed intent to resign by the employee.

5.1.9

For instance, in *Koos v. A & A Contract Customs Brokers Ltd.*, 2009 BCSC 563, the plaintiff left work to run a personal errand saying she would only be gone for a few minutes. She was gone over one hour and her manager reprimanded the plaintiff upon her return calling her a liar for saying she would only be gone for a few minutes.

The plaintiff was upset by the accusation, particularly because it was spoken loudly enough that other employees were able to overhear it. The plaintiff reported the incident to her superior, Ms. Arnett, who then convened a meeting between the manager and the plaintiff. The next day, Ms. Arnett was informed by an employee that the plaintiff had told other employees that the meeting had been one-sided and against her. Ms. Arnett expressed her disappointment to the plaintiff for speaking about the meeting that way. The plaintiff then burst into tears and Ms. Arnett suggested that she leave work for the day.

The plaintiff went to the hospital and received medication for anxiety and asked that a note be faxed to the employer indicating that she would be off work for two weeks due to anxiety. The plaintiff was told that the fax had been sent to her employer and she believed it had been sent. While the defendant received the fax, it was not brought to the supervisor's attention until several weeks later after the supervisor had left messages for the plaintiff at her home.

The supervisor, receiving no answer to two messages she had left for the plaintiff, wrote a letter to the plaintiff advising her that the defendant was assuming that she had abandoned her position. The plaintiff responded by letter which stated that she had not terminated her employment and that she was away due to sickness.

The Court stated at paras. 15-19:

[15] In this case, the issue is whether the plaintiff's conduct was such that the defendant was entitled to treat it as abandonment of her employment. I conclude that the defendant was not so entitled. The plaintiff never told Ms. Arnett at any time that she was quitting. Ms. Arnett did not ask the plaintiff whether she was quitting. On the contrary, she told the plaintiff only to take the rest of her day off. The plaintiff received no warning not to leave her employment in the manner that she did, nor was she forbidden to take sick leave. In fact, the plaintiff had taken three months off earlier in the year on medical grounds. Ms. Arnett could not know for certain that the plaintiff had received her telephone messages, particularly because the plaintiff's answering service was recorded with a male voice, and she did not follow up the messages until she sent a letter on December 31 advising the plaintiff that her employment was terminated.

The Court also had the following to say about the plaintiff's conduct which was not free from reproach:

[16] Ms. Arnett was no doubt displeased with the plaintiff's conduct at work and with her failure to communicate with her employer afterwards. I do not assume that Ms. Arnett ever received the doctor's note. I do not say that it was reasonable or justifiable for the plaintiff to obtain on request a two-week sickness pass without full examination of the reasons why she might or might not need to be away from work. In some circumstances this could be judged to be cause for dismissal, but not in this case, and in any event, the defendant did not plead cause in this action.

[17] I do not overlook the conduct of the plaintiff in denying that she received the telephone messages from Ms. Arnett. Another employee at the defendant's office testified to having visited the plaintiff on December 27, 2007 at which time she informed him that she had, in fact, heard the telephone messages but had chosen not to answer them.

[18] *Not to answer the messages was, of course, irresponsible of her. In other circumstances it might have sufficed as proof of her resignation. However, it remained Ms. Arnett's responsibility to clarify the facts with the plaintiff before she confirmed the termination of*

the employment. Her actions after receiving the answer from the plaintiff on January 4, 2008 suggest that the desire to be rid of the plaintiff coloured her judgment of the facts, and induced her to act prematurely. [emphasis added]

[19] In the circumstances, I cannot find that a reasonable person would have regarded the actions of the plaintiff as an unequivocal resignation or abandonment of her employment. Therefore the letters sent by Ms. Arnett to the plaintiff on December 31st, 2007 and January 11, 2008, constituted a wrongful dismissal. The plaintiff is entitled to damages.

Nevertheless, the plaintiff's conduct did not constitute job abandonment and this case suggests that employers should be careful not to act precipitously in cases where an employee has not indicated an intention to resign and where a miscommunication may be responsible for a lack of understanding about an employee's situation. Again, in cases where an employer may wish to treat the employee's conduct as evidence of abandonment or deemed resignation, it appears there is an obligation on the employer to clarify the facts or confirm the employee's intentions prior to deeming an employee's conduct to constitute a resignation or abandonment of his or her job.

Similarly, in *Pereira v. the Business Depot Ltd. (c.o.b. Staples Business Depot)*, 2009 BCSC 1178 var'd on other grounds, 2011 BCCA 361, the plaintiff began working for Staples Business Depot in 1997 as a sales manager. Approximately three years later, he became general manager of a Staples store in Nanaimo.

In June 2003, the plaintiff was struggling with depression and drug addiction and went on short term disability until November of that year. About a month later, in December of 2003, he required another leave to deal with his depression and drug problems. He went on short term disability again and moved to Kelowna to get away from his drug contacts in Nanaimo. In or about June of 2004, he began receiving long term disability benefits.

As part of the insurer's requirements for the plaintiff to remain eligible for long term disability, he was obliged to attend at a treatment facility at his own expense. He agreed and informed Staples that he intended to return to work in Nanaimo on September 7, 2004 once he had completed treatment. He notified Staples again on September 1, 2004 that he intended to return to work around September 7, 2004 and he also informed Staples at that time that he had been assigned a rehabilitation specialist to assist him with his return to work.

The plaintiff had asked Sun Life to send his disability cheque to Kamloops because he needed to use the money to move back to Nanaimo. He informed Staples that he would provide them with an update on his status once he was back in Nanaimo.

The plaintiff's disability cheque was sent in error to the Staples head office in Ontario and had to be re-sent to the plaintiff in Kamloops. Accordingly, the plaintiff had to wait for the cheque before he could move. The plaintiff contacted Staples and Sun Life regarding the cheque on September 16, 2004 and informed them that he needed the funds from the disability cheque before he could move back to Nanaimo.

When the plaintiff's cheque arrived, he moved back to Nanaimo on September 18, 2004. He stayed in a hotel and began looking for a permanent residence as well as a mental health support group and a psychiatrist. He did not inform Staples (or Sun Life) that he had arrived in Nanaimo.

Staples called the residence where the plaintiff was staying in Kamloops and inquired as to where the plaintiff was. The plaintiff's friend with whom he had been staying in Kamloops informed Staples that he had moved back to Nanaimo.

Over the next few days, and following discussions between Staples and Sun Life, a decision was made to terminate the plaintiff's long term disability benefits on September 24, 2004. Staples had expected the plaintiff back at work on September 21, 2004, two weeks after he completed his treatment program. However, at trial, a representative for Staples confirmed that it had neither communicated

any expectation to the plaintiff that he was to return to work by September 21, 2004 and nor had it done anything internally to coordinate a return to work around this date (e.g., it had not scheduled him for work on September 21, 2004).

By September 28, 2004, Staples had still heard nothing from the plaintiff and decided that he had abandoned his employment because they had no way to contact him. Staples sent a letter to the plaintiff's friend's house in Kamloops where he had been staying to inform him that Staples considered his employment to be at an end.

In her examination in chief, a witness for Staples made the following statements as to why Staples had considered the plaintiff to have abandoned his employment:

We felt that he had abandoned his position because we had no way of contacting him. He had not made any efforts to contact us. So we had no way of knowing where he was. And the only, um, address that we knew to contact him at was the Kamloops and we had tried phoning him there and he wasn't there.

The BC Supreme Court ruled that it was "unreasonable, on an objective basis" for Staples to have concluded that the plaintiff had abandoned his employment (para. 78).

Regarding the conclusion by Staples that the plaintiff had abandoned his employment because Staples could not contact him, the Court had the following to say at para. 75:

In my view this difficulty in contacting Mr. Pereira does not advance the defendant. When Mr. Pereira was asked whether he had tried contacting Staples in this period, he responded "why would I?" This fairly describes his understanding of what was expected of him. Mr. Pereira communicated that he was still in Kamloops well beyond when he had originally hoped to be. He communicated he was leaving for Nanaimo when he received his cheque, he communicated what his plans were for the period following his arrival, he communicated or was told to contact Mr. Gilbert to set up a return-to-work plan once he was set up in Nanaimo. Finally, he was expressly told by Ms. Binns and Mr. Gilbert not to contact the Staples store until after he met with Mr. Gilbert. None of this could reasonably cause the plaintiff to believe that the defendant would be concerned about his whereabouts for a few days or draw the conclusion that he had abandoned his position.

On appeal, Staples argued that the trial judge misapplied the test for abandonment because he did not conduct an objective assessment of the circumstances from the employer's perspective but, rather, did so from the employee's perspective. Staples argued that an abandonment determination must be made solely on the basis of "the facts known to the employer at the time."

The Court found that it was not necessary for it to reach a conclusion with respect to whether it was proper for the trial judge to have regard to what the plaintiff believed as a result of conversations he had with representatives of Sun Life (of which Staples was unaware). This is because the facts which were within Staples's knowledge were not capable of objectively supporting its conclusion that the plaintiff's failure to report for work by September 21, 2004 signified an intention on his part to abandon his employment.

The Court concluded at paras. 58 to 60:

[58] In light of the fact that Staples knew that Mr. Pereira was in Kamloops on Thursday, September 16, 2004, waiting for the funds he needed in order to return to Nanaimo, it was not objectively reasonable for Staples to believe that his failure to report for work in Nanaimo five days later, or even during the following week, evinced an intention on his part to abandon his employment. Mr. Pereira had consistently expressed a desire to return to work at the store in Nanaimo. However, it was clear that once he arrived in Nanaimo he would require time to re-establish himself there, both in terms of living arrangements and medical and other support.

[59] That Sun Life had advised Staples that it had terminated Mr. Pereira's benefits based on its expectation that he would return to work by September 21, 2004, was not determinative given what Staples knew about the problems caused by the non-delivery of the disability cheque. It is also significant that Staples never told Mr. Pereira when it expected him to report for work.

[60] I would, accordingly, albeit for somewhat different reasons, affirm the trial judge's finding that Mr. Pereira was wrongfully dismissed.

The decision in *Pereira* indicates that employers should proceed with caution when concluding that an employee has abandoned his or her employment, particularly if that employee has endured difficult circumstances or may be under a misunderstanding about the employer's expectations relating to communication or attendance.

Finally, the decision in *Beggs* confirms that employers should, prior to concluding that an employee has abandoned their employment, consider whether the employee's circumstances, medical issues or misunderstanding may have led to the lack of communication particularly if that employee has experienced difficulties or presented medical evidence as reasons for their absence or lack of communication.

In *Beggs*, the plaintiff had worked as a grocery store clerk for 10 years for the defendant on Vancouver Island. The day after her mobile home suffered a serious fire, she telephoned her boss to let him know she could not attend at work as scheduled and that she did not know when she would return.

The plaintiff's phone was disconnected and when the defendant could not reach her for almost a month, it prepared a record of employment which indicated that the plaintiff had resigned.

The plaintiff was diagnosed with severe depression and when the plaintiff later came to the store to provide a doctor's note explaining her absence, she was shocked to learn that the defendant viewed her as having resigned and had prepared a record of employment and her final pay.

Instead of speaking with her employer, the plaintiff hired a lawyer who accused the defendant of firing her in an insensitive manner, referring to the medical evidence of which the defendant was at that point unaware. In response, the defendant maintained the plaintiff resigned voluntarily.

The trial judge concluded, without any analysis, that the plaintiff had not abandoned her position, but rather, had been dismissed by the employer. The Court of Appeal upheld the dismissal despite concluding that the trial judge did not provide any findings of fact to support the conclusion that the plaintiff had been dismissed. The Court of Appeal found that, before the lawyers were involved, there was a genuine misunderstanding on the defendant's part about the plaintiff's intentions and the reasons for her absence from work. However, when the defendant's lawyer maintained that the plaintiff had quit her job, despite seeing medical evidence showing that she was ill, defendant had effectively dismissed her, even though it had not intended to so.

V. The Issue of Voluntariness

The law is settled that if the employer initiates the end of the employment relationship, then the termination of the employment is considered a dismissal, whereas if the employee freely and voluntarily chooses to end the relationship, then such conduct constitutes a resignation (*Farber v. Royal Trust Co.* (1997), 145 D.L.R. (4th) 1 (S.C.C.) at para. 22; *Templeton v. RBC Dominion Securities Inc.*, 2005 CarswellNfld 216 (N.L.T.D.) at para. 46). However, there are cases in which the voluntariness of the resignation is at issue.

Where, for example, an employee is coerced into resigning by being told that if they do not resign, they will be dismissed, courts across Canada have generally been in agreement that such conduct on the part of the employer constitutes a dismissal.

For instance, in *Buchanan v. Continental Bank of Canada*, [1984] N.B.J. No. 338 (N.B.Q.B.), at para. 23, Jones J. found that the plaintiff was [constructively] dismissed where he was given a choice to either resign or be fired. The Court held that he had no judgment to exercise in terms of whether or not he continued his employment with the defendant and as such, his resignation could not be voluntary. A similar finding was reached in *Deters v. Prince Albert Fraser House Inc.* (1991), 4 W.A.C. 205 (Sask. C.A.) and in *Frank v. Federated Co-operatives Ltd.*, [1998] A.J. No. 12 (Q.B.).

What causes more difficulty for the courts are cases in which there is an evidentiary dispute on the facts as to whether a resignation was coerced or whether it was tendered freely and voluntarily. A review of those cases sheds some light on how the courts will deal with such issues.

In *Templeton*, the plaintiff was an investment dealer. The defendant in that case sought to dismiss the plaintiff, alleging cause as a result of transactions which the defendant alleged were not in the interest of the client. The defendant told the plaintiff that if he was considering working in another firm in the future, it would be in his best interest to resign. The defendant further told the plaintiff that he was finished work but had until 5:30 that day to tender his resignation. At trial, the defendant admitted that he would have dismissed the plaintiff had he turned down the offer to resign.

The plaintiff in that case testified that prior to submitting his written resignation the next day, he consulted with two people who advised him that resignation would be his best course of action and the plaintiff testified that understood that the consequences of a resignation (i.e., that he would not be entitled to severance pay). Finally, the plaintiff stated that he would not have resigned had he not been given an ultimatum.

In the result, the Court found that the resignation was coerced and therefore, not voluntary. The Court confirmed that the issue to be decided was who terminated the relationship (para. 47). The Court analyzed the facts in that case as follows:

[46] *It is important to distinguish between a letter of resignation and resignation itself. A resignation is the decision to terminate the relationship or, equally, a fact or circumstance which unequivocally reflects that decision. A letter of resignation is simply evidence—usually cogent evidence—of the employee’s decision to end the relationship. But it is no more than that; a letter of resignation is not, in and of itself, the employee’s termination of the relationship.* [emphasis added]

[47] It seems to me that, in circumstances such as the present, the question to be asked is—“who terminated the employment relationship?” Did the employer end the relationship, or did the employee, freely and voluntarily, choose to terminate his or her employment?

[48] Here, it is clear that the decision to end Templeton’s employment was made by the employer. Templeton did not choose and would not have chosen to leave his employment. I am content to conclude that Templeton’s letter of resignation was informed and voluntary, although he was no doubt under some stress. *His subsequent actions in writing his “Happy Resignation Day” email were consistent with his having resigned. But the letter and email were little more than external trappings, window dressing, if you will, for outside consumption. The end of Templeton’s employment with the DS was brought about solely by the decision and act of the employer.* Templeton indeed had a choice whether or not to write a letter of resignation, but he had no choice in whether or not to leave his employment. That decision was taken by the employer. [emphasis added]

[49] Templeton did not resign. He did not of his own free will decide to end his employment with DS. DS decided to and did terminate Templeton’s employment.

In *Samuda v. Recipco Corp.*, 2007 BCSC 1013 at para. 114, aff’d 2009 BCCA 33, leave to appeal to SCC denied, 2009 CarswellBC 2260, the plaintiff was told that the defendant could no longer continue to pay her and that if she would provide a resignation letter, it would attempt to provide her final salary

to her. The plaintiff acquiesced, however, the Court concluded the resignation was not voluntary and was, in fact, a dismissal.

In *Moreno v. Comfact Corp.*, [2009] O.J. No. 2878 (S.C.J.) (QL), the plaintiff had provided his employer with a resignation letter, however, subsequently, the parties decided to work out their issues and the plaintiff withdrew his resignation. Although the parties agreed they would continue on as though nothing had occurred, the employer still had the resignation letter on file and it attempted to use this at a later date to allege the plaintiff had resigned. The Court concluded, based on an assessment of the surrounding circumstances and credibility of the parties, that the plaintiff had not quit, but rather, had been dismissed.

Similarly, in *Chan v. Dencan*, 2011 BCSC, the plaintiff had worked as a general manager for Denny's Restaurants for 15 years. In or about 2009, his immediate supervisor began criticizing his work performance and threatened to dismiss him if his work did not improve. In or about the summer of 2009, the plaintiff's immediate supervisor told him that he was going to be fired, but that he could "save face" by resigning. The plaintiff agreed to do so and provided a resignation letter and attended a retirement dinner held by Denny's. However, during his exit interview, he broke down in tears and told the VP of Operations that he did not want to resign but did so because he was told he had no choice and was going to be fired. He quickly got his job back through the intervention of the Denny's management.

Just over a year later, around October of 2010, the Denny's restaurant for which the plaintiff was responsible was unexpectedly busy for a weekday lunch hour and to add further to the difficulty, a staff member had called in sick and there was an equipment malfunction in the kitchen. As a result, food service was very slow.

The plaintiff's supervisor, Mr. Edward So (who had coerced him into resigning in 2009), and who was present during the lunch time episode, was angry and again told the plaintiff that he could either resign or be fired. The plaintiff again opted to resign to save face and make his subsequent job search easier. He prepared a resignation letter that same day which stated:

After my vacation ended a week ago, I then realized that my wife needs my attention more than I anticipated as well as looking after my own health—advised by my family physician to slow down.

At trial, the plaintiff testified that his wife was on long-term disability as a result of a work-related accident, but did not need special care and that his doctor did not, in fact, advise him to slow down. The plaintiff's family physician gave evidence at trial confirming that he never advised the plaintiff to slow down and the plaintiff had no health problems that would prevent him from working. The plaintiff also testified that he was in no financial position to retire. In support of that, the plaintiff provided proof of all the jobs he had been applying for since the day after his dismissal.

In response to being asked at trial why he put concrete reasons for his resignation into the letter if they were not true, the plaintiff responded that he did so "for no particular reason."

The Court concluded on this point that if the plaintiff was, in fact, resigning to save face and avoid being fired, having already once resigned then returned, it was unsurprising that he would attempt to put some credible sounding explanation on the record, knowing that this explanation would likely be communicated to others within the company.

The Court considered *Templeton* and found that while a resignation letter constitutes evidence of a voluntarily dismissal, the surrounding circumstances, including the credibility of the witnesses, needed to be considered. The Court concluded that the plaintiff had been dismissed. In this regard, the Court stated at para. 37:

On the basis of all of the evidence, including the evidence of the plaintiff, which I find to be more credible than that of Mr. So, I find that the plaintiff resigned only because Mr. So had told him he would be dismissed if he did not. The resignation was therefore not voluntary and was, in fact, a dismissal without cause.

Based on the foregoing cases, it appears that courts will carefully review the surrounding circumstances as well as the credibility of the parties to determine what really occurred and whether an employee resigned voluntarily or was dismissed. Furthermore, the courts have also made it clear (in *Templeton* and *Chan*) that they are willing to look behind compelling evidence of a voluntary resignation (i.e., a resignation letter) and consider what occurred and determine who really ended the employment relationship.

VI. How Does an Employee's Mental State Affect the Validity of a Resignation?

The following comment of the Alberta Court of Queen's Bench is illustrative of the general consensus of the courts regarding the mental state of an employee in the context of a resignation when the mental state falls short of constituting a mental illness:

[49] The circumstances surrounding the alleged resignation must be considered in determining whether a reasonable person would conclude that a plaintiff intended to resign. Emotional or angry outbursts are not a reasonable basis for an employer coming to that conclusion. *Robinson v. Team Cooperheat-MQS Canada Inc.*, 2008 ABQB 409 at para. 49.

From the cases in the foregoing sections of this paper, it is clear that an employee's state of mind when tendering a resignation will constitute a significant part of the surrounding circumstances and evidence which a court will consider in determining whether such an act was offered freely and voluntarily and whether it was truly meant to end the employment relationship.

However, when an employee's mental state is such that the employee may be suffering from a mental illness, the focus of the analysis may be whether the employee has the mental capacity to legally effect a resignation.

In *Elliott v. Parksville (City)*, [1989] BCJ 231 (S.C.) (QL), aff'd [1990] B.C.J. 4 (C.A.) (QL), the Court found that a resigning employee who was suffering from a serious mental illness did not have the mental capacity to contract at the relevant time and that the defendant knew or ought to have known of her condition. Consequently, the employee's letters of resignation were of no force and effect. However, in this particular case, the employer was found to have had cause to dismiss the employee.

The trial judge's comments in *Elliott* are instructive:

Medical evidence as to the plaintiff's condition at this time has been previously outlined as being that the plaintiff suffered from a mental illness substantially altering her ability to understand the nature and consequences of her actions (Exhibit 1/88) and that she was unfit to manage her affairs as she suffered from a major psychotic illness (Exhibit 1/100). Under these circumstances, it is not surprising that Mr. Hossack thought the letters were suspect. In my opinion the plaintiff did not have the mental capacity to contract at this critical stage and the defendant knew or ought to have known of her condition at that time. Consequently, in my opinion, the letters of resignation terminating the contract of employment were of no force and effect. I draw no distinction between capacity to enter into a contract and the capacity to terminate a contract. In my opinion, the capacity to terminate a contract of employment is of significance with reference to a contract of indefinite hiring as was the case at bar. The defendant's Council accepted the letters rather than, terminate for cause, according to their evidence, to avoid the plaintiff's embarrassment. In my opinion, they cannot be faulted for doing so. [at page 6, Q.L. version]

It can be inferred from this decision that when an employee is suspected of suffering from some kind of mental issue which may affect his or her decision making process, an employer should make further inquiries into the nature of the employee's mental state to determine whether they have the capacity to resign prior to accepting a resignation.

VII. What is the Effect of Retracting a Resignation?

Courts in various provinces have affirmed that an employee is entitled to revoke or resile from a resignation, be it verbal or written, before it is accepted by the employer (see *Carmichael v. Mantis Racing Inc.*, [2009] O.J. 5676 (S.C.J.) (QL); *Kirby*; *Turner v. Westburne Electrical Inc.*, 2004 ABQB 604; *Robinson*).

In BC, some courts have also held that an employee remains free to change his mind so long as the employer has not acted to its detriment upon the expression of an intention to resign (see *Tolman v. Gearmatic Co.* (1986), 14 CCEL 195 (B.C.C.A.); *Fitzsimmons v. North Thompson School District No. 26*, [1996] B.C.J. 3401 (S.C.) (QL)). Consistent with basic contract law principles, if a resignation is not accepted before it is withdrawn, the result is that no resignation occurred and the end of the employment relationship will be characterized as a wrongful dismissal (see *Cranston v. Canadian Broadcasting Corp.* (1994), 2 C.C.E.L. (2nd) 301 (Ont. Gen. Div.); *Baggio v. Incognito Software Inc.*, [2006] B.C.J. 692 (S.C.) (QL)).

VIII. Resignations under the Employment Standards Act

A. Onus

When an employee makes a claim for termination pay under s. 63 of the *Employment Standards Act*, 1996 R.S.B.C., c. 113 (the “Act”), the employee has the onus of proving that he or she was dismissed. In this regard, see *Re Dear Animal Hospital Ltd.*, [2001] B.C.E.S.T.D. No. 147 (QL) and *Re Fretter Design Inc.*, [2001] B.C.E.S.T.D. No. 669 (QL).

If the employer denies the dismissal and asserts that the employee resigned, the onus then shifts to the employer to prove that an employee has resigned: see, for example, *Re Philp*, [2004] B.C.E.S.T.D. No 58 (QL) and *Re Interior Flight Systems Ltd.*, [2001] B.C.E.S.T.D. No. 103 (QL).

B. Standard of Proof

A resignation must be proven on a balance of probabilities. A review of the Employment Standards decisions indicates that “clear and unequivocal” evidence is required to establish a resignation (see *Re Krazy Willy’s Buy & Sell Ltd.* (21 September 2000), BCEST #D473/00 (Stevenson); *Re Burnaby Select Taxi Ltd.*, [1996] B.C.E.S.T.D. No. 85 (QL); *Re O’Cana Enterprises Inc.*, [1997] B.C.E.S.T.D. No 513 (QL); *Re North Crescent Cranberries Ltd.*, [1996] B.C.E.S.T.D. No. 229 (QL); and *Re Dunn’s Automatic Transmission Ltd.* (5 September 1997), BCEST #D394/97 (Stevenson)).

While the words “clear and unequivocal” may suggest a standard of proof that is higher than a balance of probabilities, the Adjudicator in *Re Whitehall Bureau of Canada Ltd.*, [2010] B.C.E.S.T.D. No. 26 confirmed that even though the standard of proof is described in Employment Standards decisions by adjectives such as “sufficient, clear, cogent and convincing,” the standard of proof is on a balance of probabilities, not higher.

C. Legal Test for Resignation under the Act

The test to determine whether an employee has validly resigned under the Act has both objective and subjective elements (see *Re Valley Alarms and Communications Ltd.*, [1997] B.C.E.S.T.D. No 73 (QL) and *Re Safety First Fire Control Ltd.*, [1997] B.C.E.S.T.D. No. 221 (QL)).

The test was nicely summarized by Mr. Ken Thornicroft for the Employment Standards Tribunal in *RTO (Rentown) Inc.*, [1997] B.C.E.S.T.D. No. 43 (QL) as follows:

Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their “resignation” when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must have clearly communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an “outside observer” must be satisfied that the resignation was freely and voluntarily given and represented the employee’s true intention at the time it was submitted. (page 4, Q.L. version).

D. Objective Element of the Test

The objective element of the test requires the employer to demonstrate that the act(s) of an employee, viewed by reasonable members of the community, would be considered as an act of resignation.

Examples of such acts that have met the objective element of the test include:

- leaving work in the middle of the day after the employer told the employee that if he left, he was not to come back (see *Re Ohyama & Roche Inc.* (21 October 1997), BCEST #D490/97));
- failing to attend at work for four days and working for another employer during that time (*Re Murphy Aircraft Mfg.*, [2000] B.C.E.S.T.D. No. 449 (QL)); and
- accepting work with a second employer which precluded the employee from being able to work his shifts with his first employer (*Re Kernested*, [2004] B.C.E.S.T.D. No. 106 (QL)).

By contrast, in *Re Nekleva*, [1998] B.C.E.S.T.D. No. 22 (QL), following an argument with the employer and leaving the workplace in anger, the employee left his tool box and his work clothes in his work area and never outright said he quit. While he punched his time card and left, these acts, in the absence of other objective evidence of an intention to quit were insufficient objective evidence of a resignation.

E. Subjective Element of the Test

The second part of the test is subjective; the employee must have demonstrated a clear intention to quit (see *Re Valley Alarms and Communications Ltd.*, [1997] B.C.E.S.T.D. No 73 (QL) and *Re Safety First Fire Control Ltd.*, [1997] B.C.E.S.T.D. No. 221 (QL)).

As at common law, the Employment Standards Tribunal is also of the view that a coerced resignation is not voluntary, and therefore, lacks the required subjective element, namely, the intention to resign. See, for example, *Re Lordco Parts Ltd.*, [1997] B.C.E.S.T.D. No. 26 (QL) and *Re Wilson Place Management Ltd.*, [1996] B.C.E.S.T.D. No. 44 (QL)).

F. Notice of Resignation by Employee

As at common law, if an employee tenders his resignation for a date in the future, the employer cannot end the employment relationship before that date and avoid its liability for termination pay under s. 63 of the Act. See *Re Brady’s Burnside Fish & Chips Ltd.*, [1996] B.C.E.S.T.D. No. 89 (QL) and *Re 582195 B.C. Ltd. (c.o.b. Great Clips)*, [2003] BCEST #D049/03 (Thornicroft).

IX. Resignations under the Employment Insurance Act

The following section contains a brief overview of how “resignations” are treated under the *Employment Insurance Act*, S.C. 1996, c. 23 (the “EI Act”). In preparing this section, we primarily considered the Service Canada website, which is an indispensable resource for anyone assisting an EI

claimant. In addition to including links to the text of the EI legislation and regulations, the site contains the *Digest of Entitlement Principles*, which sets out the principles applied by Human Resources and Social Development Canada when making decisions on EI claims, and an *Index of Jurisprudence*, which is a supplement to the *Digest* and provides access to a searchable database of summaries of jurisprudential decisions, categorized by issue.

A. The Legislative Regime

In the EI context, the issue of whether an employee has “resigned” is relevant to the employee’s eligibility for EI benefits. Having said this, the term “resignation” is not used in the EI Act. Rather, the applicable term is “voluntarily leaving employment.” As the introduction to Chapter 6 of the *Digest* explains:

The purpose of the Employment Insurance system has long been described as an insurance scheme which is in place to compensate persons whose employment has terminated involuntarily and who are without work.

As part of this system, provisions exist within the legislation that limit the payments in circumstances where claimants voluntarily place themselves in a position of unemployment.

Accordingly, the legislation provides for claimants to be disqualified from receiving benefits if they have voluntarily left their employment without just cause.

The EI Act provisions of primary relevance for our purposes are ss. 29 and 30:

29. For the purposes of sections 30 to 33,
- (a) “employment” refers to any employment of the claimant within their qualifying period or their benefit period;
 - (b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;
 - (b.1) voluntarily leaving an employment includes
 - (i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,
 - (ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and
 - (iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and
 - (c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
 - (i) sexual or other harassment,
 - (ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,
 - (iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,
 - (iv) working conditions that constitute a danger to health or safety,
 - (v) obligation to care for a child or a member of the immediate family,
 - (vi) reasonable assurance of another employment in the immediate future,

- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30(1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

- (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
- (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

There are, of course, other related legislative provisions which counsel may wish to consider in this context. For example, where an individual takes a leave of absence but fails to prove having just cause for doing so, disentitlement would occur under s. 32 of the EI Act.

B. Two-Step Analysis

Sections 29 and 30 create a two-step inquiry. The first question is whether the employee's leaving was voluntary. The burden of proof to establish the voluntary leaving is on the Canada Employment Insurance Commission. Once the voluntary leaving is established, the burden shifts to the claimant, who must show just cause for the leaving.

C. Voluntarily Leaving

According to the *Digest*, "voluntarily leaving means that the claimant and not the employer took the initiative in terminating the employer-employee relationship." Legislated examples of voluntarily leaving are those set out in s. 29(b.1) above.

The Federal Court of Appeal in *Attorney General of Canada v. Peace*, 2004 FCA 56, has indicated that the determination [under s. 30(1) of the EI Act] of whether an employee has voluntarily left his employment boils down to one question: did the employee have a choice to stay or to leave?

Chapter 6 of the *Digest* provides a discussion of various circumstances in which it may be difficult to determine whether or not the reason for separation was one of voluntary leaving. Of particular interest (given the position taken by the courts on similar situations, discussed elsewhere in this paper) are the following statements found in the *Digest*:

6.3.5 Withdrawal of Notice of Resignation or of Dismissal

When an employee unsuccessfully attempts to withdraw a notice of resignation previously given to the employer, the separation is nevertheless considered voluntary. This same principle applies as well to a person who requests to be re-hired once the resignation has taken effect ... [See also CUB 22680 where the employee was found to have voluntarily withdrawn even though her resignation was withdrawn before being formally accepted by the employer].

6.3.9 Threat of Resignation or of Dismissal

Separating from employment upon an employer's invitation to do so, after having first threatened to leave, constitutes voluntarily leaving employment. Likewise, a statement made to an employer as an ultimatum that if working conditions are not changed one would cease their employment, amounts to voluntarily leaving if it results in the termination of the employment ...

Just Cause

As noted above, subsection 29(c) of the EI Act states that "just cause for voluntarily leaving an employment ... exists if the claimant had *no reasonable alternative* to leaving ... having regard to all the circumstances," including the enumerated list of examples in that subsection.

According to the *Digest* (see 6.4.1 and 6.4.2), the test of "no reasonable alternative" was added to the legislation to reflect the standards established by past jurisprudence:

With this same objective in mind, the legislator identified a number of circumstances that the jurisprudence has historically shown to be just cause for voluntarily leaving employment. The list of circumstances in 29(c) should not however be seen as exhaustive. The existence of any particular circumstances in and of itself does not automatically give an individual *just cause* for leaving employment, as claimants must also show that they had no reasonable alternative.

...

The definition of "reasonable alternative" can certainly vary from one case to another. The legislation does not ask claimants to do the impossible in establishing just cause for voluntarily leaving; all it requires is what is reasonable under the circumstances.

It is worth noting that section 6.8.0 of the *Digest* contains a list and discussion of the 40 main reasons that the jurisprudence has historically considered when determining if just cause exists for voluntarily leaving employment. Where applicable, references to the relevant jurisprudence are also noted.

D. Constructive Dismissal

One final point of interest is the apparent similarity between the factors listed in s. 29(c) of the EI Act and the common law test for constructive dismissal. As the Court explained in *Peace* at 16, however:

...The factors set out in paragraph 29(c) of the Act, which determine whether an employee had just cause for leaving his employment, resemble the grounds upon which a finding of constructive dismissal could be made at common law. However, the fact that the factors in section 29 resemble the grounds for constructive dismissal does not mean that, where such grounds exist, there has been no voluntary leaving under the Act. Factors such as whether there has been a significant modification of the terms of the employment contract relate to the issue of whether or not an employee had just cause for leaving as opposed to the issue of whether the employee left voluntarily. The courts and umpires have recognized that the factors which may constitute just cause under section 29 of the Act resemble the factors which may result in a finding of constructive dismissal at common law but this does not change the test under the Act as to whether the leaving was voluntary. See *Canada (A.G.) v. Sulaiman* (23 June 1994), Toronto A-737-93 (FCA); CUB 19432 (1991) (MacKay J.); CUB 47452 (2000) (Marin U.); CUB 18009 (1990) at 3 (MacKay J.); CUB 22778 (1994) (MacKay J.).

X. Conclusion

As this paper shows, cases involving disputes about resignations are highly fact-driven and ultimately, courts will want to see clear evidence, prior to accepting that an employee resigned, that the resignation was clear and unequivocal in demonstrating an intention to resign, and that it was freely and voluntarily provided to the employer. As a result, prior to taking steps to end the employment relationship following acts on the part of an employee which may be a resignation, employers should take the necessary steps to clarify the facts and ensure the employee's intention is truly to resign.

When dealing with resignations under the Employment Standards or Employment Insurance legislation, as outlined in this paper, a slightly different analytical framework will be applied, but nonetheless, the employee's true intention to leave his or her employment will be at the heart of the issue.

