Heat of the moment resignations — the Employment Court goes back to the basics, 25 August 2022

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What action should an employer take when an employee resigns in an emotional outburst? Accept the resignation? Wait for the employee to calm down and readdress? Refuse to accept the resignation and impose a “cooling off” period? Two recent Employment Court decisions have clarified the legal position, emphasising that the real focus should be on the employee’s actions.

The previous position

For many years, the courts have held that an employee may have a valid unjustified dismissal claim where the employee resigns in the “heat of the moment” and their employer relies on that resignation. Those decisions reflect the well-known practicality that when tensions run high, people can say things which they do not really mean. The decisions included that an employer cannot seize upon or take advantage of words of resignation that were clearly unintended by the employee. The decisions explained that where words of resignation form part of an emotional outburst, an employer cannot safely insist on its interpretation of what the employee said or wrote.

The legal guidance was often that the employer should instead provide the employee with a “cooling off period” to calm down and reconsider any statements or impressions made.

However, 2 recent Employment Court judgments take a different approach.

***Vermuelen* v *Mikes Transport Warehouse Ltd* [2021] NZEmpC 197**

On 5 March 2020, Mr Vermuelen was summoned to a meeting with his employer, Mikes Transport Warehouse Ltd (MTW). The purpose of the meeting was to provide Mr Vermuelen with sales advice to address his poor sales performance. During the meeting, Mr Vermuelen became upset and expressed his view that he was struggling to perform the role. He then resigned. The meeting then turned to address alternative employment opportunities, and it was agreed that Mr Vermuelen would commence work for Modern Transport Engineers Ltd (MTE). Further issues arose, and Mr Vermuelen was dismissed from his employment with MTE on 12 March 2020.

Mr Vermuelen brought personal grievance claims against both MTW and MTE.

The heat of the moment resignation issue arose in relation to Mr Vermuelen's claim that he had been unjustifiably dismissed by MTW at the 5 March 2020 meeting.

The Court considered the events of the meeting to determine whether Mr Vermuelen had been dismissed or had resigned.

The Court referred to its previous cooling off decisions, which held an employer cannot reasonably rely on statements which are clearly the product of intense anger or emotion. However, the Court clarified while "*on the face of those authorities, an obligation would appear to have arisen for MTW Ltd to allow for a 'cooling off' period*", the Court preferred a different approach.

The Court based its approach on 4 key points:

- Resignation is a unilateral act. Once it has been notified (in any form, by conduct, orally or in writing), an employer cannot claim the relationship remains on foot or that the resignation is of no effect.
- An employee is not required to justify their decision to resign, and their decision does not need to be demonstrably well thought through. The option remains open to the employer to re-engage an employee on the same terms and conditions, if the employee changes their mind after a period of reflection.
- The key issue is whether, on an objective assessment, the employee has resigned. Referencing the Court's earlier cooling off decisions, the Court noted "a resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner, or which are plainly not meant to be taken seriously". If there is, in fact, a voluntary resignation, the employer does not have a legal obligation to hold off on recognising the resignation for fear that accepting a resignation too quickly could turn it into a dismissal.
- Concern about whether a resignation arose from an employer's misconduct or breach could be addressed via the law relating to constructive dismissal.

Importantly, the Court's decision clarifies an employer is not automatically obliged to provide a cooling off period.

Applying the law to this case, the Court held that Mr Vermuelen resigned from MTW. His personal grievance claim for unjustified dismissal from MTW was rejected.

***Urban Décor Ltd* v *Yu* [2022] NZEmpC 56**

In this case, the employment of 2 employees (Ms Yu and Ms Jin) ended during a heated argument with their employer. On the facts, it was accepted both employees had stated they "quit" and had left the company's premises.

The Employment Relations Authority had found the employees were unjustifiably dismissed, on the basis that Urban Décor had failed to allow for a cooling off period before sending the employees dismissal letters.

Urban Décor challenged the decision of the Employment Relations Authority. On appeal, the Employment Court considered whether the employees resigned, or whether they were dismissed. The Court endorsed the approach taken in Vermuelen, summarising the analysis as follows:

> "*Whether or not an employee has resigned is an objective test as to whether a reasonable employer, with knowledge of the surrounding circumstances, would have reasonably considered the employee to have resigned. Clear words of resignation are likely to clear that bar unless a different understanding can be informed by the surrounding circumstances*".

The Court reviewed the events on an objective basis. It held the facts showed the employees had resigned. Relevant facts were that the employees had stated they quit, taken their bags and left the workplace abruptly without clocking out for the day. They did not return to work that day. No contact was made until after work hours, and in those subsequent communications the employees did not indicate any intention to return to work.

Practical guidance — should employers still provide "cooling off" periods?

The Employment Court's judgments indicate the focus in a "heat of the moment" resignation should be on whether the employee has, objectively, resigned from their employment, rather than whether the employer has provided an adequate cooling off period. The Court's clarification reinforces the legal point that resignation is a unilateral act, and accordingly, an employer is not obliged to provide a cooling off period. It indicates where an employee resigns in an angry outburst, an employer may be entitled to rely on that resignation, provided the surrounding circumstances do not inform the employer that in fact, resignation could not reasonably be understood to have occurred.

A key takeaway is the Court's guidance that an employer should consider the circumstances surrounding the employee's decision to resign. Relevant factors to consider will include:

- The events leading up to the resignation.
- Whether any pressure had been placed on the employee to resign.
- The level of anger or emotion displayed.
- The actual words written or said by the employee.
- What has happened to company property.
- Whether the employee returned to the workplace.
- The content and tone of subsequent communications.
- Acceptance of any alternative employment.

And it is still the case that, for example, resignations given in a humorous or sarcastic fashion may not be safely relied upon by the employer.

However, despite the Court's recent clarification of the legal position, employers should be wary of immediately dismissing the established wisdom regarding cooling off periods as being without any practical merit. As the Court has highlighted, where an employee resigns in the heat of the moment, an employer should genuinely consider the employee's position and the surrounding circumstances. An employer that seizes upon a heat of the moment resignation could be placing itself at risk of an unjustified dismissal or constructive dismissal claim. Cooling off periods are perhaps better framed as time in which the employer can step back and consider the full picture surrounding the employee's resignation.