NOVA SCOTIA COURT OF APPEAL
Citation: *Kerr v. Valley Volkswagen*, 2015 NSCA 7

Date: 20150122
Docket: CA 425085
Registry: Halifax

Between:

Gary Wilfred Kerr

Appellant

v.

2463103 Nova Scotia Limited, carrying on business as Valley Volkswagen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Fichaud, JJ.A.
Appeal Heard:	December 1, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	Michael V. Coyle, for the appellant Peter D. Nathanson, for the respondent

Reasons for judgment:

[1] A former parts manager at a car dealership claimed that he had been terminated without notice or cause. He brought an application in court seeking pay in lieu of notice.

[2] The employer denied the claimant's version of events, saying that he had given them an ultimatum to raise his pay by a $100 per week or he would quit. After waiting three weeks to see if he would change his mind - which he did not – management accepted his resignation.

[3] The case was tried before Nova Scotia Supreme Court Justice Gregory M. Warner. Because the proceeding had been commenced as an application, the direct evidence consisted of four affidavits; one from the claimant, Mr. Kerr, and three others introduced on behalf of the car dealership. Mr. Kerr and a Mr. Mapplebeck who was the owner of the dealership, were both cross-examined on their affidavits. However, the claimant elected not to cross-examine the other affiants, a Mr. Peter Benjamin, his supervisor, and a Mr. Max Davidson, a co-worker.

[4] In the face of the employer's acknowledgement that it did not have cause to terminate Mr. Kerr without notice, Justice Warner recognized that the principal issue he had to decide was "whether Mr. Kerr quit or was terminated". This issue is ultimately and essentially a question of fact. Given the "significantly different" versions of events offered by the employee, and the employer, the judge underscored the fact that assessing credibility would be central to resolving the dispute.

[5] Citing the leading authorities, Warner, J. understood that to be effective and binding, an employee's resignation must be evident in clear and unambiguous terms. Whether an employee has resigned requires a careful examination of the context having regard to all of the circumstances. The resignation must be voluntary and the employee's words or conduct evidencing a resignation, must be clear and unequivocal and objectively reflect an intention to resign:

> III. DISTINGUISHING QUITTING FROM DISMISSAL
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> ¶13.12 It may sometimes be difficult to determine whether the employment relationship has been terminated by a quit on the employee's part or by a dismissal on the part of the employer. The courts … have held that a valid

> resignation must have a subjective as well as an objective component. The former requires conduct on the employee's part that unequivocally manifests that he or she had the subjective intention of quitting. The latter requires conduct on the employee's part that would lead a reasonable person in the position of the employer to believe that the employee has carried out his or her subjective intention. …
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> (*Employment Law in Canada*, 4th ed., looseleaf, (Markham:LexisNexis, 2005), c. 13, by Geoffrey England and Innis Christie and Peter Barnacle)

[6] Justice Warner carefully considered the evidence in the affidavits as well as the testimony of those affiants who were cross-examined. He made strong findings of fact and credibility, declaring:

> [45] Where the evidence of Mr. Kerr varies from that of Mr. Benjamin and Mr. Davidson, I prefer the evidence of Mr. Benjamin and Mr. Davidson.

[7] Commenting upon the credibility of the claimant, Justice Warner said:

> [46] Mr. Kerr's responses on cross-examination with regards to his intent by the words he used on June 3rd were vague and inconsistent. Mr. Kerr's failure to include in his affidavit that he was paid bonuses … was a troublesome omission. His statements that it was never suggested that his job performance needed improvement … and to the effect that the concern over excess parts inventory was not justified … are not credible. He was told by his supervisor, on many occasions … that any raise in his salary would involve better job performance, and resolution of the excess parts inventory concern.

[8] Several times in his decision Justice Warner noted that Mr. Benjamin (the claimant's supervisor) and Mr. Davidson (the claimant's co-worker) were not cross-examined on their affidavits. In his reasons Warner, J. said:

> [47] The unchallenged affidavits of Mr. Benjamin and Mr. Davidson are clear. Counsel chose not to cross-examine either affiant. Mr. Benjamin had no motive to testify other than truthfully. The evidence of Mr. Benjamin is corroborated by the evidence of Mr. Davidson, and respecting June 24, by Harvey Mapplebeck. The evidence of Mr. Benjamin and Mr. Davidson is more consistent with the probabilities that surround the circumstances than the evidence of Mr. Kerr.
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> [48] I conclude that Mr. Kerr gave a clear and unequivocal ultimatum to Mr. Benjamin on June 3rd to give him a raise of $100 a week or he would quit. He stated that he had another job opportunity that would pay him more money. He told Mr. Davidson that management did not realize that he was serious about following through on his intention to quit and go work for his brother-in-law.

> [49] His employer had told him that his performance was substandard because of the excess parts inventory before June 3rd, and consideration of a pay raise depended on his performance. Even after June 3rd, while his employer watched and waited, he took no step to deal with the inventory issue. He gave his employer no basis for considering his demand for a raise. During that three-week period, Mr. Kerr did not withdraw his ultimatum and did not appear to take any steps to solve the inventory problem. He misjudged his value to his employer.
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> [50] This Court turned its mind to whether the evidence contains any hint that the employer acted harshly or opportunistically to take advantage of Mr. Kerr's frustration and ultimatum. I found none.
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> [51] Mr. Kerr's June 3rd ultimatum to quit (if not given a raise) was made following Mr. Benjamin's May 31st suggestion that consideration of a raise depended on improved performance to him and Mr. Kerr's reply that he would think about what Mr. Benjamin said and let him know. His ultimatum was not given rashly or impetuously. During the next three weeks he had time to improve his job performance, and to retract the ultimatum if he had changed his mind; he did neither. It was reasonable for the employer to wait three weeks before concluding that it should accept Mr. Kerr's resignation.

[9] Based on his assessment of credibility and the evidence before him, Justice Warner concluded:

> [53] Mr. Kerr's June 3rd threat to resign was made in clear and unambiguous terms. In all the circumstances of this case, a reasonable person would have understood that Mr. Kerr was serious in his intention to resign and take up another job opportunity that would pay more, if he was not given the demanded raise.
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> [54] Mr. Kerr's demand was the result of dissatisfaction with not receiving a raise in his base salary for seven years, but his statement to Mr. Benjamin was more than merely an expression of dissatisfaction. If it was made rashly on June 3rd, which the Affidavit of Mr. Benjamin does not support, it could have been withdrawn at his initiative at any time over the next three weeks.
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> [55] Given all of the circumstances, I conclude that a reasonable person would have understood that Mr. Kerr's statement that he was quitting if not given a $100 per week raise was to be taken seriously and a true statement of his intent.
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> [56] Mr. Kerr quit. He was not terminated. His Application is dismissed.

[10] After carefully considering the record and counsels' submissions, I am satisfied that Justice Warner did not err in his application of the law to the evidence and the issues before him; or in his evaluation of credibility; or in his factual

findings and inferences drawn from those facts. In short, there is nothing here which would warrant our intervention.

[11] Before concluding these reasons, I wish to dispose of one particular submission made by the appellant at the hearing. He argued that he was not bound by the ultimatum he had given his employer. He said that even if his words amounted to a resignation, he was entitled to resile from that resignation, unless his employer had acted upon it to its detriment. In his submission this would require the employer to have incurred some expense or suffered some pecuniary loss, as a consequence. Examples were given, such as having to hire a replacement or having to post and pay for an advertisement to fill the vacancy, etc. In other words – according to the appellant – Valley Volkswagen could not terminate their employment relationship by merely accepting Mr. Kerr's resignation, but must instead have done something more to its detriment. Under the appellant's view, an employee has the right to resile from a resignation up to the point that the employer relies upon that resignation to its detriment.

[12] With respect, the appellant's statement of the law is wrong. His position runs contrary to the basic principles of contract law, which hold that all that is necessary to bring a contract to a close is the communicated acceptance of a valid offer (S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora: Canada Law Book Ltd., 2010), p. 20). Whether or not a party relied upon an offer to their detriment is only relevant in cases where the offer has *not* been accepted. Once it has been accepted, the contractual bargain (to terminate the employment relationship) has been struck.

[13] The appellant supports his position with a passage from Stacey Ball's, *Canadian Employment Law*, (Toronto: Canada Law Book Ltd., 2013), at 8-10. The section reads:

> The test for determining whether an employee has resigned is an objective one. As Millward J. states: "Given all the surrounding circumstances, would a reasonable man have understood by the plaintiff's statement that he had just resigned?" It is perilous for an employer to precipitously take the employee as having resigned his or her employment.
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> In order to tender an effective resignation, an employee must have the legal capacity to contract. An offer of resignation may be revoked before there is acceptance thereof. If a letter of resignation is not accepted as offered, it is not binding on the employee and does not terminate the employment relationship. An

> employee may resile from the resignation, provided the employer has not relied on it to its detriment. [Underlining mine]

[14] The appellant reads this passage as saying that the employer must show detrimental reliance in order for a resignation to ever bind the employee. Respectfully, this is not the law. The passage from Ball quoted above, and the jurisprudence upon which it relies, only provides for resilement in situations where the resignation has not been accepted by the employer. If the resignation has been accepted, an employer's detrimental reliance upon the resignation is irrelevant. Mr. Kerr has not provided any authority in which an employee was allowed to resile from an *accepted* resignation. Nor am I aware of any. As I will explain, there are a number of cases in which an employee has been allowed to resile from an offer of resignation, but in each case the resilement occurred prior to the acceptance of the offer.

[15] In **Kieran v. Ingram Micro Inc.**, [2004] O.J. No. 3118 (C.A.), the Ontario Court of Appeal reversed the trial judge's finding that the plaintiff had resigned. Lang, J.A. found that the employee had not tendered a valid resignation because his words, viewed objectively, did not amount to an unequivocal statement of an intention to resign. Having found that there was no resignation, the court then declined to consider any issues relating to retraction.

[16] Similarly, in **Tolman v. Gearmatic Co.**, [1986] B.C.J. No. 481 (C.A.), the British Columbia Court of Appeal allowed the appeal and awarded damages for constructive dismissal after finding that the employee had not resigned and had at most merely expressed an intention to resign in the future. Citing the famous old English case where Lord Denning first expressed and endorsed the doctrine of promissory estoppel in **Central London Property Trust v. High Trees House**, [1947] K.B. 130, [1956] 1 All E.R. 256, Hutcheon, J.A. in *obiter* opined:

> Unless the employer acted to its detriment on the expressing of intention to resign, the plaintiff remained free to change his mind (¶14).

Whatever might be the implications were such a doctrine applied in the context of an employment contract, **Tolman** has no application to the facts of this case where a valid offer of resignation was made and accepted.

[17] The appellant also cites **Turner v. Westburne Electrical Inc.**, 2004 ABQB 605 to support his position on this point. Again, this was a case in which the

resignation was retracted prior to acceptance. The court summarized the facts of the case at ¶50:

> [50] In short, I find that Mr. Turner offered his resignation on December 4, 2001, in the heat of the moment and after a difficult weekend and workday Monday. The resignation was not immediately accepted, and it was suspended when Mr. Henderson called Mr. Turner on December 4, 2001 to ask that he meet with Mr. Ricker to sort things out. The fact that Mr. Turner never did sign a written resignation is, in my view, further evidence that he never really intended to resign. At the December 5, 2001 meeting Mr. Turner effectively took his verbal resignation off the table. From that point on, Mr. Turner consistently indicated that he had no intention of leaving the company. The offer to resign was retracted before it was accepted.

[18] In **Kirby v. Amalgamated Income Limited Partnership**, 2009 BCSC 1044, Metzger, J. reaffirmed at ¶130 that "an employee may revoke an offer of resignation **before it** is accepted, particularly so if the offer is made in the heat of the moment". (My emphasis) The court went on to find that the employee had withdrawn the resignation by accepting a compromise agreement.

[19] Finally, in **Cranston v. Canadian Broadcasting Corp.**, [1994] O.J. No. 605 (S.C.J.), Toller Cranston, a well-known Canadian figure skater and former world champion who worked as a CBC colour commentator, warned that he would resign if he were forced to meet with Alan Clark, the network's head of sports, about a complaint. Ferrier, J. concluded:

> 35 … on all the evidence that the offer of resignation was a conditional one - it was dependent on the necessity of meeting Clark that day. Even if it was not, Cranston revoked his offer before the C.B.C. communicated its acceptance. No other reasonable interpretation can be put on his words, "I'd like to have the weekend to think about this."
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> 36 In the circumstances, notice of acceptance of Cranston's offer of resignation was required. Such notice was not given before he revoked his offer. As well, in the circumstances, the conduct of Mr. Cranston did not amount to a repudiation of the agreement.

[20] From these and similar cases we see that a critical question whenever resilement is pleaded, is whether the threat (offer) to quit was accepted and whether the retraction of the resignation occurred prior to the communicated acceptance. Any issue with respect to an employer's detrimental reliance only arises if the employee's resignation has not been accepted.

[21] Based on the evidence presented by the employer through Messrs. Benjamin, Davidson and Mapplebeck, Justice Warner found as a fact that Mr. Kerr did not attempt to resile from his offer of resignation until after it had been accepted by the dealership. Thus, the sequence of events as found by Warner, J. was that Mr. Kerr made a conditional offer to resign, which was accepted three weeks later by the dealership. After the resignation was accepted, Mr. Kerr attempted to resile by asking for his job back. Had Mr. Kerr retracted his offer to resign during the intervening three weeks, he would not necessarily have been bound by the resignation, and the employer would have had to show detrimental reliance in order to enforce it. However, as the offer was accepted prior to it being retracted, there was no need to consider the employer's reliance (to its detriment). Valley Volkswagen's acceptance of Mr. Kerr's valid offer of resignation was sufficient to bring their employment relationship to a close.

[22] For all of these reasons, I would dismiss the appeal with costs to the respondent of $2,000.00 inclusive of disbursements.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.