SUPREME COURT OF NOVA SCOTIA

Citation: *Kerr v Valley Volkswagen*, 2014 NSSC 27

Date: 2014-01-23
Docket: Ken No. 419749
Registry: Kentville

Between:

Gary Wilfred Kerr

Applicant

v.

2463103 Nova Scotia Limited,
carrying on business as Valley Volkswagen

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 8 and 10, 2014, in Kentville, Nova Scotia
Counsel:	**Michael Coyle**, for the Applicant **Peter Nathanson** with **Cheri Killam A.C.**, for the Respondent

By the Court:

[1] For 7½ years, Gary Kerr was the Parts Manager at Valley Volkswagen. Mr. Kerr says that on June 25, 2013, he was terminated without notice or cause. He seeks pay *in lieu* of notice.

[2] Valley Volkswagen says that on June 3, 2013, Mr. Kerr gave it an ultimatum to give him a $100 per week raise or he would quit. On June 24, 2013, it accepted his resignation.

[3] The issue is whether Mr. Kerr quit or was terminated.

[4] The law is important but not really in dispute. The facts and application of the law to the facts are disputed.

[5] Because this proceeding was commenced as an application in court, direct evidence consisted of four affidavits, one by the Applicant Employee and three on behalf of the Respondent Employer. The Applicant Gary Kerr and the owner of the Respondent, Harvey Mapplebeck, were cross-examined on their affidavits. The Applicant elected not to cross-examine the other affiants, Peter Benjamin, his supervisor, and Max Davidson, a co-worker.

The Facts

Gary Kerr's Version

[6] In his Affidavit, Gary Kerr swears that he had been employed as the Parts Manager at a local GM dealership for 28 years. He applied for and was hired by Valley Volkswagen in February 2006 as its Part Manager at a salary of $35,000.00 per year. The salary never changed.

[7] Mr. Kerr states that he was never disciplined or warned about his job performance. The only issue of concern to his employer was that he carried an excessive parts inventory.

[8] On or about May 12, 2013, his assistant was injured and replaced with the owner's brother. Mr. Kerr felt that the owner's brother was neither experienced nor competent and interfered with his work. He complained to his supervisor Peter Benjamin for better help.

[9] Mr. Kerr's version of key events are set out in paras 9 to 14 of his Affidavit:

> 9. On or about June 3, 2013, I went again to my supervisor, Peter Benjamin, to discuss the situation in the Parts Department. I explained that I needed the help of a competent person in the parts department. During that discussion, I pointed out that [I] had not had a raise in pay since [I] started working for the Respondent, almost seven and one-half (7 ½) years previously, and I felt that if I did not get someone reliable to help me in the parts department and a raise in pay, I "may have to pursue other options".
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> 10. I am completely certain those were my exact words, because I chose them carefully, and by those words I meant that I may have to consider looking for employment as a Parts Manager at a another (competing) car dealership. I did not say that I was quitting my job or that I had formed any plan to quit my job nor, in my belief, would it have been reasonably possible in the context for Mr. Benjamin to have understood me to say that I was quitting my job. My understanding at the end

> of our discussion was that Mr. Benjamin had taken my requests under advisement and that he would get back to me about them in the near future.
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> 11. Three weeks went by during which time I received no reply from my supervisor or anyone else on behalf of the employer.
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> 12. On the afternoon of Monday, June 24, 2013 the Applicant's supervisor, Peter Benjamin, asked me what my plans were with respect to my continued employment with the Respondent. I replied that nothing had changed. I reiterated that I was still asking for a raise in pay and for competent help in the Parts Department. I did not repeat in that discussion what I had said on June 3, 2013 about the possibility that I might have to "pursue other options" because it was unnecessary for me to have done so and Mr. Benjamin did not bring it up. Mr. Benjamin told me that Valley Volkswagen was advertising for a new Assistant Parts Manager but that there would be no raise in my pay at that time. Mr. Benjamin encouraged me to consider the matter of my future with Valley Volkswagen further and he told me that we would meet again soon to discuss it.
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> 13. I did indeed give the matter considerable anxious thought that night. I was very happy to hear that we would be hiring a new Assistant Parts Manager, but I was disappointed to learn that after all my time with this employer that I was still being denied a raise in pay. I liked my job and I love the kind of work I was doing but I felt undervalued. However, considering that I had a job in my field that I was content with, reasonably good benefits, and the fact that I had been treated decently by Valley Volkswagen over the years, I decided that this would not be a good time for me to leave my job over the pay issue alone.
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> 14. The next day, Tuesday, June 25, 2013, I met again with Peter Benjamin. Mr. Benjamin asked me what I had decided, which I understood to mean whether I was prepared to remain in my job with no raise in pay or whether I would be leaving voluntarily. I told Mr. Benjamin that I had given the matter considerable thought and that I had decided to remain in my job. Mr. Benjamin immediately replied that my continued employment was "not an option". Mr. Benjamin then told me that I was being dismissed from my employment with Valley Volkswagen, effective that day. I was told to gather my personal belongings, turn in my keys and leave the premises immediately, which of course I did.

[10] The Record of Employment from the employer, dated July 2, 2013, did not state that he had quit (code E), but rather the reason given was "other" (code K).

[11] Mr. Kerr denies the employer's evidence that it checked the "other" box as opposed to the "quit" box as an act of kindness to enable him to receive EI benefits earlier. When Mr. Kerr did advise the employer of this claim, the employer advised Service Canada that he had quit. He has received EI benefits since August 2013.

[12] Mr. Kerr was cross-examined. Questions focused on what Mr. Kerr meant by paras 9 and 10 of his Affidavit, and whether, in fact, he gave his employer a threat or ultimatum to quit if he did not receive an increase in pay. Mr. Kerr denied making a threat but, when pushed as to

what he intended by the "carefully chosen" words he claims to have used with Mr. Benjamin, Mr. Kerr wavered and at one point answered that he did not know.

Valley Volkswagen's Version

[13] Peter Benjamin Affidavit: From July 2012 to September 2013, Mr. Benjamin was the fixed operations manager at Valley Volkswagen. He is no longer employed by Valley Volkswagen. He was Mr. Kerr's supervisor and the only person in authority who communicated with Mr. Kerr on behalf of Valley Volkswagen about his employment status.

[14] Mr. Benjamin's version of events differs significantly from Mr. Kerr's. Surprisingly, Mr. Kerr's counsel did not cross-examine Mr. Benjamin on his evidence. His Affidavit reads in part as follows:

> 12. On two occasions prior to May, 2013, I mentioned to Mr. Kerr that his performance as Parts Manager was substandard because of the excessive inventory, and that he needed to begin reducing the excess inventory as soon as possible.
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> 13. I did not, subsequently or otherwise, observe any reduction in excess inventory or increase in product returns.
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> 14. During my time at Valley Volkswagen, Mr. Kerr told me on several occasions that he was frustrated that he had not had a raise in pay since he began working at Valley Volkswagen.
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> 15. On Friday, May 31, 2013, I met with Mr. Kerr on my office at Valley Volkswagen.
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> 16. During that meeting I told Mr. Kerr that the excessive inventory problem must be resolved.
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> 17. In response, Mr. Kerr alleged that Ron Mapplebeck, who was assisting Mr. Kerr in the Parts Department after Janet MacLellan was injured and unable to work, was interfering in his ability to manage the department and carry out his duties.
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> 18. I replied to Mr. Kerr that he was fully in charge of the Parts Department and that there was no way that Ron Mapplebeck should be impeding Mr. Kerr in carrying out his duties. I told Mr. Kerr that the ultimate responsibility for performance of the Parts Department was his alone.
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> 19. During that same meeting, I told Mr. Kerr that if he wanted a raise – something that he had suggested a number of times – the issue of his compensation could be reviewed at some point in the future if he improved his performance as Parts Manager and reduced the excessive inventory that had accumulated to that point.
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> 20. In response, Mr. Kerr said that he would think about my proposal and let me know, and ended the conversation.
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> 21. On Monday, June 3, 2013, Mr. Kerr again came to my office at Valley Volkswagen.

22. He stood in the doorway and said "I want a $100 per week raise or I'm gone." He stated that he had another job opportunity available to him that paid him more money, and that he intended to quit if he did not receive a $100 per week raise.

23. In response, I said that I could not approve his raise request because that was not within my power and it was not discussed in our conversation of May 31.

24. After this conversation, I spoke with Harvey Mapplebeck, owner of Valley Volkswagen, and told him that Mr. Kerr had threatened to quit if he did not receive a $100 per week raise.

25. Mr. Mapplebeck and I agree that, by his ultimatum, Mr. Kerr had placed Valley Volkswagen in a difficult business position: either Valley Volkswagen had to do as Mr. Kerr demanded and give him a raise or Valley Volkswagen would risk the sudden departure of the Manager for the Parts Department.

26. From June 3 to June 24, 2013, Mr. Kerr continued to attend work.

27. During this time, he had the opportunity to retract his ultimatum of June 3, but never did so.

28. During this time, Mr. Kerr also appeared to take little or no action to resolve the excess inventory problem in the Parts Department.

29. After several weeks, Harvey Mapplebeck and I decided that Valley Volkswagen had no choice except to accept Mr. Kerr's resignation.

30. Mr. Mapplebeck and I determined that Mr. Kerr's performance to date did not warrant a raise, and that Valley Volkswagen could not continue any longer under the threat of his quitting.

31. It was decided that I would respond to Mr. Kerr's June 3 ultimatum by saying no to his raise demand and by accepting his resignation.

32. On June 24, 2013, I met with Mr. Kerr in my office at Valley Volkswagen and advised him that Valley Volkswagen would not be giving him the raise he demanded and, as a result, had accepted his resignation.

33. I explained to Mr. Kerr that he had backed us into an impossible corner by making his ultimatum, and he replied "I know I did." He then asked if he could have job back, and I replied no.

[15] Max Davidson Affidavit: Mr. Davidson was the Service Manager at Valley Volkswagen from 2011 to 2013. He is now the Parts Manager. His version of events corroborates Mr. Benjamin's evidence and tends to contradict Mr. Kerr's version. Surprisingly, Mr. Kerr's counsel did not cross-examine him. His Affidavit reads in part:

9. On June 3, 2013, Mr. Kerr and I had a conversation at Valley Volkswagen.

10. During that conversation Mr. Kerr told me that he was frustrated with not having received a raise since he began his employment, and said that he was entitled to a raise after six years of service.

> 11. Mr. Kerr told me that he was going to speak to management that same day to demand a raise in pay.
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> 12. Mr. Kerr said that, if management did not give him a raise, he would quit his job at Valley Volkswagen to take up a new job with his brother-in-law.
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> 13. Later on June 3, 2013, Mr. Kerr and I again spoke.
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> 14. He told me that he had asked Peter Benjamin, his supervisor, for a raise, and that he had told Mr. Benjamin that if he did not receive an answer within a week, he would quit.
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> 15. Mr. Kerr told me that Mr. Benjamin had not given him an answer that day.
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> 16. Over the next three weeks, Mr. Kerr continued working at Valley VW, but he told me on several occasions that he had not heard a response from management to his ultimatum, and that he was growing increasingly frustrated with management.
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> 17. On one occasion, Mr. Kerr told me that management did not realize that he was serious about following through on his intention to quit to go work for his brother-in-law if he did not receive a raise.

[16] Harvey Mapplebeck Affidavit: Mr. Mapplebeck is the sole shareholder and general manager of Valley Volkswagen, which has approximately 26 employees. He hired Mr. Kerr as Parts Manager in 2006, believing him to have been unemployed at the time of his hire. He did not check with Mr. Kerr's prior employer before hiring him or before this litigation.

[17] Contrary to Mr. Kerr's Affidavit, Mr. Mapplebeck says that Mr. Kerr was paid a base salary, plus bonuses based upon an objective formula related to the performance of the Parts Department. On cross-examination he was unable to recall the amounts of the bonuses without checking with his controller. It appeared that the Parts Department had not done well recently and no bonus was paid.

[18] He did not have discussions with Mr. Kerr about his employment performance after his hiring.

[19] Mr. Mapplebeck was concerned about the excess parts inventory carried by Mr. Kerr. That inventory problem was only liquidated (cleared up) after Mr. Kerr's resignation. His Affidavit discusses the Record of Employment and why the Respondent's controller checked the "other" box on the ROE when, in fact, it was his understanding from his communication with Mr. Benjamin that Mr. Kerr had resigned.

[20] Mr. Mapplebeck's Affidavit respecting the events leading to what he considered a resignation read in part as follows:

> 28. On Friday, June 3, 2013, I had a conversation with the then-Fixed Operations Manager, Peter Benjamin. Mr. Benjamin told me, and I verily believe, that:
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> a. Mr. Kerr had demanded a $100 per week raise and threatened to resign if he did not get it; and

b. Mr. Benjamin told me that he replied to Mr. Kerr that a raise would be considered in the future if Mr. Kerr resolved the excess inventory problem in the Parts Department.

29. Mr. Kerr's ultimatum put Valley Volkswagen in a difficult position where it had to choose between a sudden loss of its Parts Manager or granting a raise that Mr. Kerr's performance did not warrant.

30. I was also concerned about granting a raise under such pressure because of the example it would set for other employees at Valley Volkswagen and because I was aware that Mr. Kerr had told at least one other employee (Max Davidson) about Mr. Kerr's demand for a raise and his intention to quit if he did not receive the raise.

31. I was concerned that other, better performing employees would consider it unfair if I granted a raise to one of their coworkers based on his threat rather than on his job performance.

32. For those reasons, Mr. Benjamin and I resolved to wait and give Mr. Kerr an opportunity to retract his threat to resign.

33. During the next three weeks, Mr. Kerr came to work but did not retract his resignation threat or otherwise discuss his demand for a raise with me.

34. During this time, I am not aware of any action taken by Mr. Kerr to resolve the excess inventory problem in the Parts Department.

35. As it appeared, based upon the information provided (or not provided) to me, that Mr. Kerr had not rescinded his threat to quit if he was not given a raise, I decided that Valley Volkswagen should accept Mr. Kerr's resignation.

36. In consultation with Peter Benjamin, I determined that Valley Volkswagen could not continue any longer until the threat of Mr. Kerr quitting, but also did not wish to grant an unwarranted raise under such pressure.

37. On June 24, 2013, Mr. Benjamin told me, as we had agreed he would do, that he had accepted Gary Kerr's resignation effective that day.

[21] Mr. Mapplebeck was cross-examined. His answers in cross-examination were consistent with his Affidavit. He understood from Mr. Benjamin that Mr. Kerr demanded a raise and threatened to quit if he did not get it and that he had another job that would pay more money. He did not know at that time where the other job was, but heard elsewhere that it was with Mr. Kerr's brother-in-law. He took Mr. Kerr's threat very seriously.

[22] Mr. Mapplebeck took issue with Mr. Kerr's counsel characterization of Mr. Kerr's pay as not having raised at any time from his hiring. He acknowledged that his base salary had not been raised but that he earned bonuses, which were based upon meeting financial targets for the Parts Department. He stated that a raise in salary would be earned by job performance, and that Mr. Kerr had not earned a raise without resolving the excess inventory problem. In his affidavit, he stated that he was unaware of any action taken by Mr. Kerr to resolve that problem during the three weeks between June 3 and June 24.

[23] Mr. Mapplebeck confirmed that everything he knew about Mr. Kerr's intentions came from what Mr. Benjamin told him. His only communication with Mr. Kerr about his employment status came after Mr. Benjamin had accepted Mr. Kerr's resignation on June 24. After Mr. Benjamin accepted Mr. Kerr's resignation, Mr. Kerr came to see to him in his office, where Mr. Mapplebeck was with another person. Mr. Kerr came to say good-bye. When the person in the room asked Mr. Kerr what was going on, Mr. Kerr said that he was all done and "leaving on good, mutual terms".

The Law

Employment Context

[24] In the unanimous decision of the Supreme Court of Canada in *McKinley v BC Tel*, 2001 SCC 38, Justice Iacobucci made reference to "the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship." (para 54) To underscore the point, Justice Iacobucci repeated the often-quoted dictum of Chief Justice Brian Dickson:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[25] In *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, the Supreme Court of Canada recognized that there is an implied term in the employment contract of "good faith and fair dealing" that requires "at a minimum" that:

> … in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. (para 98)

[26] In *Honda v Keays*, 2008 SCC 39, the Supreme Court of Canada explicitly confirmed the implied duty of "good faith and fair dealing" in the employment contract, breach of which can be compensable. As the majority put it at para 58:

> At least since [*Wallace*], there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal.

[27] In **Geoff R. Hall**, *Canadian Contractual Interpretation Law, Second Edition* (Markham: LexisNexis, 2012), at ch. 7.4.1 Hall makes similar contextual observations about employment contracts:

> The interpretation of employment contracts is one of several areas in which policy goals other than interpretative accuracy affect the interpretative process. . . . Unless there is a contractual provision to the contrary, an employment contract will be interpreted in a manner which further employment law principles, specifically the protection of employees who are vulnerable in dealings with their employers and for whom employment is important to their sense of self-worth. …

> However, at the end of the day, interpretation of an employment contract is still an exercise in contractual interpretation, so in the absence of some basis for refusing to enforce a contract (such as unconscionability) the intention of the parties will generally prevail if they are clearly expressed, even if doing so detracts from the employment law goals which are otherwise presumed to apply. …
>
> The courts go some considerable distance to protect employees, and in doing so will read many things into employment contracts, which may be hard to reconcile with the parties' intentions. At the same time, the courts are reluctant to override clear contractual interpretations and generally will give effect to those intentions if clearly expressed. …

Quitting or Termination

[28] The employer in this case acknowledges that it did not have cause to terminate Mr. Kerr without notice. Its defence rests entirely upon a finding that Mr. Kerr resigned or quit.

[29] The employee in this case does not allege that he was constructively dismissed; that is, that he was forced to resign. He simply submits that he did not quit.

[30] Several texts and precedents provide guidance on the analytical process. The academic analyses are supported by the decisions cited in the texts. Those cited in this decision are relied upon by the Court.

[31] The texts include: **Ellen E Mole**, *Wrongful Dismissal Practice Manual*, Second Edition, looseleaf (Markham: LexisNexis, 2005) c. 2.99 to 2.247; **Howard A Levitt**, *The Law of Dismissal in Canada*, Third Edition, looseleaf (Aurora: Canada Law Book, 2003) c. 12:10.20; **Geoffrey England & Innis Christie & Peter Barnacle** (Principal Revising Author), *Employment Law in Canada*, Fourth Edition, looseleaf (Markham: LexisNexis, 2005) c.13.1 to 13.17; and **Stacey Reginald Ball**, *Canadian Employment Law*, looseleaf (Aurora: Canada Law Book, 1996) c. 8.

[32] Counsel referred the Court to the following decisions: by the Applicant: *Burns v Sobeys*, 2007 NSSC 363, *Ruparell v Armbrae Academy*, 2012 NSSC 211, and *Hynes v Qullig*, 2013 NUCJ 25; and by the Respondent: *Burns*, supra, *Larsen v Airarms Fasteners & Industrial*, [1999] BCJ No. 883 (BCSC), and *Anderson v Buffalo Airways*, 2011 NWTSC 3.

[33] In *Kieran v Ingram Micro Inc.*, [2004] OJ No. 3118 (ONCA), and *Robinson v Team Cooperheat-MQS Canada*, 2008 ABQB 409, the courts articulated when a resignation can be attributed to an employee.

[34] At paragraphs 27 to 31, in *Kieran*, Lang JA wrote:

> [27] A resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention: *Skidd v. Canada Post Corp.*, [1993] O.J. No. 446 (Gen. Div.), aff'd [1997] O.J. No. 712 (C.A.).
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> [28] Whether a resignation was clear and unequivocal was considered in *Moore v. University of Western Ontario*, (1985), 8 C.C.E.L. 157 (Ont. H.C.J.), a decision

relied upon by the appellants. In *Moore*, the employee wrote the university president stating that he considered a new requirement to report to someone other than the president to amount to constructive dismissal. He said that, while continuing to remain in his job, he would seek other employment. The university accepted "this resignation", even when the employee responded that he had not intended to resign. *Moore*, which held that the president was not entitled to interpret the employee's letter as an unequivocal intention of the employee's resignation, was a fact-driven application of the principle that a resignation must be clear and unequivocal. A similar application of fact to law can be found in *Mitchell v Westburne Supply Alberta* 2000 ABQB 377 (CanLII), (2000), 2 C.C.E.L. (3d) 87 (Alta. Q.B.).

[29] Similarly, Mr. Kieran's conduct and its implications are fact-driven. The issue is whether Ingram was entitled, at law, to treat Mr. Kieran's statements as clearly and unequivocally amounting to his resignation.

[30] Whether words or actions equate to resignation must be determined contextually. The surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood Mr. Kieran to have unequivocally resigned.

[31] Mr. Kieran did not plainly state that if his competitor was chosen as president he would leave. Had he done so, such a statement may well have amounted to an unequivocal statement of an intention to resign. Instead, however, he said that if Mr. Schofield were chosen as president, he required an international transfer. He made this statement knowing he was a valued employee, that Ingram representatives had, in the past, confirmed the availability of international positions for him, and in the belief that Mr. Rodek could and would arrange such a position. Indeed, Mr. Rodek undertook to try to do so. At no time did Mr. Rodek, or anyone at Ingram, give Mr. Kieran any reason to believe that such transfer would not, in time, be successfully arrange

[35] At paragraphs 38 to 42 in *Robinson*, Lee J. wrote (with citations deleted):

[38] A plaintiff has the onus of establishing that he was terminated. Case law from Alberta and elsewhere in Canada indicates that the test is: "Given all of the circumstances, would a reasonable person have understood by the plaintiff's statement that he had just resigned?"

[39] The test is an objective one: it does not matter what the employer actually understood, but rather what a reasonable employer would have understood in the circumstances.

[40] A resignation must be made in clear and unambiguous terms in order to be effective and binding on the employee. A resignation must be clear and unequivocal to be effective. The test for determining whether an employee has resigned their position is an objective one, meaning the court must be satisfied given all the surrounding circumstances that a reasonable person would understand by the plaintiffs actions that they had resigned.

> [41] In my view, it is necessary to establish an agreement to terminate an employment relationship in clear terms. The most that can be said of the actions and words of the plaintiff in the summer months of 1988 is that they were expressions of dissatisfaction and of an intention to look for an alternate position. There was no agreement that the contract would end on a stipulated date. I find the plaintiff was dismissed and because there was not cause for the dismissal, he is entitled to damages in lieu of notice.
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> [42] A resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention.

[36] In *Dragone v Riva Plumbing* [2007] OJ No.3710 (OSCJ), Perell, J., adds (with citations deleted):

> [3] Whether Ms. Dragone resigned is a contextual issue of fact. A 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. All the circumstances must be considered to determine whether a reasonable person would conclude that the employee intended to resign.
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> . . .
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> [11] In any event, there is another reason why the communications between Mr. Ferrari and Ms. Dragone and the circumstances of the party do not amount to a resignation. The case law establishes that words or acts of resignation said under emotional trauma, for example, words said in anger or desperation, can be recanted when emotions have settled, unless the employer has acted to its detriment. In my view, that is what occurred in this case.

Analysis

[37] Case law suggests that where an employee expresses dissatisfaction with an employer or about a wrong committed by the employer (real or perceived), and declares an intention to seek other employment without words or actions indicative of an immediate firm intention to quit, he or she has not quit. (See: *Mosher v Twin City Dairy* (1984), 63 NSR (2d) 252 (NSSC); *Widmeyer v Municipal Ent. Ltd*. (1991), 103 NSR (2d) 336 (NSSC); *Tolman v Gearmatic*, [1986] BCJ No. 481 (BCCA); *Danroth v Farrow Holdings Ltd*., 2005 BCCA 593, *Assouline v Ogivar Inc*., [1991] BCJ No. 3419 (BCSC); *Turner v Westburne Electrical Inc.*, 2004 ABQB 605; *Carmichael v Mantis Racing Inc*., [2009] OJ No. 5676 (OSCJ), and *Ruparell*)

[38] Case law suggests that where the employee, in a state of depression, frustration or emotional angst makes a hasty (usually) statement that he or she quits and shortly thereafter, realizing the rashness of his or her statement or actions, either retracts the statement in short order or engages in discussions with the employer to patch up the dispute leading to the declaration of intent to quit, the employee has not quit. (See: *Cranston v Canadian Broadcasting Corp. (CBC)*, [1994] OJ No. 605 (OSCJ); *Maguire v Sutton*, [1998] BCJ No. 138 BCSC); *Movileanu v Valcom Manufacturing Group Inc.*, [2007] OJ No. 4414 (OSCJ); *Turner*; *Carmichael*; *Robinson* and *Burns*)

[39] On the other hand, when the words or actions of the employee demonstrate a clear intent to resign, either unconditionally, or as part of an ultimatum, the courts have not hesitated to find that the employee quit. (See: *Bevis v Renaissance Wine Merchants Ltd.*, 2006 ABQB 8 (upheld on appeal: *Bevis v Renaissance Wine Merchants Ltd*., 2007 ABCA 356); *Eichenberger v Heath Consultants Ltd.*, [1997] BCJ No. 2682 (BCSC)*; Larsen*; *Anderson*; and *Billows v Canare Forest Products Ltd*., 2003 BCSC 1352)

[40] Applicant's counsel submits that, even if Mr. Kerr's ultimatum of June 3rd constituted a resignation, he resiled from it before the employer had acted on it to its detriment. Counsel argues that, even if the Court finds that the employer accepted Mr. Kerr's resignation before Mr. Kerr retracted his resignation, Mr. Kerr could lawfully retract it so long as the employer had not acted to its detriment on it. He relies upon the quote from Stacey Ball's text, cited at para 20 in *Ruparell*, which quote does not specify whether retraction is available after acceptance of a resignation. This quotation appears to flow from paras 13 and 14 of the *Tolman* decision.

[41] In my view, the retraction of a clear notice to quit must occur and be communicated to the employer before the employer communicates acceptance of the resignation to the employee. This is a contracts case. Even taking into account the special protection of employees under employment contracts, it should not be open to an employee to unilaterally retract an offer to quit once it has been accepted and that acceptance is communicated to the employee by the employer. There may exist an exception to this principle, but none relevant to the factual matrix in the evidence in this case.

[42] In *Cranston*, it was held to be significant that Cranston communicated a retraction of his resignation after CBC had decided to accept it but before it had communicated acceptance to him. In *Cochrane*, the Court held that the employee had formed the intent to retract a resignation but never communicated it to the employer before the employer accepted the resignation. In *Turner*, the Court found that the retraction occurred before acceptance.

[43] Often the employer and employee give conflicting versions of the communications and actions that occurred at the relevant times. Credibility findings are central to many resignation / termination cases. As Davison J. (as he then was) noted in *Widmeyer* at para 29, parties engage in considerable posturing after the relevant events. The Court's function is to the attempt to establish the parties' intentions and the real relationship at the relevant times. Examples of cases where credibility findings were central to the conclusion include: *Hopaluk v TransX Ltd.*, [1998] MJ No. 44 (MBCA); *Pauloski v Nascor Inc.*, 2002 ABQB 171; *Crouch v Securitas Canada*, [2008] OJ No. 45 (OSCJ); and *Larsen*.

[44] This Court has previously set out the tools it uses to assess credibility. A recent iteration is found in *Bocaneala v Liberatore*, 2013 NSSC 372, at paras 31, 33 and 34. It reads as follows:

> [31] Fact finding requires the Court to assess both reliability and credibility. Reliability relates primarily to the assessment of a witness's capacity to observe, recall and communicate accurately. Credibility involves the assessment of the believability or truthfulness of evidence.

[33] To assist in the assessment of credibility courts have approved many tools. I have done so in several decisions, including, in particular, *Re Novak Estate*, 2008 NSSC 283. Among the tools used are:

i) a consideration of the motives that witnesses may have to give the evidence as they do;

ii) the consistency or inconsistency over time between the witness's different iterations of the facts, and internal inconsistencies within a witness's testimony;

iii) the presence of collaborative or supporting evidence;

iv) the demeanor or the manner of giving evidence, but with caution; and,

v) above all, the court has to assess what appears to make common sense; in that regard, this Court notes the words of Justice O'Halloran of the British Columbia Court of Appeal in *Faryna* v. *Chorny***,** 1951 CarswellBC 133, at paragraphs 9 and 10:

> If a trial judge's finding of credibility is to depend solely on which person he thinks makes the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. . . . the appearance of telling the truth is but one of the elements. . . . Opportunities for knowledge, powers of observation, judgment, memory, ability to describe clearly what the witness has seen or heard, as well as other factors, combine to produce what is called credibility. . . .
>
> The credibility of interested witnesses . . . cannot be gauged solely by the test of whether the personal demeanor of particular witness carried conviction of the truth.

The key passage is this:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[34] It is not required that a trier of fact believes or disbelieves a witness's evidence in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and attach different weight to different parts of it.

[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.

[46] Mr. Kerr's direct evidence (in the Affidavit) with regards to the June 3rd exchange was subjected to cross-examination. 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 based on the performance of the Parts Department was a troublesome omission. His statements that it was never suggested that his job performance needed improvement (para 6), and to the effect that the concern over excess parts inventory was not justified (para 7) are not credible. He was told by his supervisor, on many occasions before June 3rd, that any raise in his salary would involve better job performance, and resolution of the excess parts inventory concern.

[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.

[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.

[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.

[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.

[52] The evidence of Mr. Mapplebeck with respect to the brief communication he had with Mr. Kerr after Mr. Benjamin had accepted the resignation corroborates Mr. Benjamin's evidence. The evidence of Mr. Davidson confirms that Mr. Kerr was serious with regards to his threat to quit and get employment with his brother-in-law.

[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.

[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.

[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.

[56] Mr. Kerr quit. He was not terminated. His Application is dismissed.

[57] The Court will receive written submissions respecting costs within thirty days, if the parties are unable to agree.

Warner, J.