



What's New in HR Law

Court Finds Employee Repudiated Employment Contract after Signing 'Strike Notice'

May 10, 2021

Bottom Line

In a recent decision from the Ontario Superior Court of Justice, a Plaintiff seeking damages for wrongful dismissal was instead found to have repudiated her employment contract. This case is a good news story for employers dealing with difficult employees. The Court's decision highlights that employees who misguidedly attempt to withhold their services as a negotiation tactic may be found in breach of their existing contractual obligations.

Background Facts

The Plaintiff, Karen Anderson, was employed by the Defendant sod-installation company as an office manager. The Plaintiff's role required her to record employee's hours of work, and prepare payroll and cheques for management approval. When a discrepancy arose regarding the cheque the Plaintiff had prepared for her husband, who was also employed by the Defendant, the Defendant refused to approve the wage payment until the inconsistency was resolved to its satisfaction. The Plaintiff disagreed that there was a discrepancy and stated via

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text message that she was “ready to leave and return when [my husband] has the pay owed to him”.

Following this text message, and a series of phone calls, the Plaintiff left the workplace. There was a factual dispute about the circumstances of her departure: the Plaintiff asserted that she had a headache and fully intended to return the next day, while another employee heard her say that she was fired and was no longer working for the Defendant.

That night, there was a meeting at the Plaintiff’s house with most of the Defendant’s employees, including the Plaintiff and her husband. They produced a document they described as a ‘Strike Notice’, which was signed by several employees and indicated they were refusing to work unless their demands were met. The Strike Notice also indicated that “those who were wrongfully terminated, namely ... Karen Anderson shall be offered their previous positions back”. The Strike Notice further demanded that the Plaintiff’s husband be paid his wages in full and that the Plaintiff be given authority to schedule employees’ hours of work without alteration by management.

The next day, in response to the Strike Notice, the Defendant barred the Plaintiff from visiting or entering any of its facilities or accessing its computers or online accounts. The Defendant was able to persuade most of the signatories to the Strike Notice to return to work, but there was an operational impact that resulted in a loss of profit.

The Plaintiff subsequently commenced an action for wrongful dismissal. The Defendant denied the Plaintiff was dismissed and counterclaimed for damages for breach of contract.

The Court’s Analysis

The Court identified four legal concepts at the heart of its analysis: resignation, abandonment, repudiation of an employment contract, and termination. The Plaintiff’s assertion was that she did not make any statement that could unequivocally be interpreted as an intention to resign, abandon or repudiate her employment. In her view, the cessation of her employment relationship was a termination, unilaterally initiated by the Defendant. By contrast, the Defendant asserted that the Plaintiff left her employment with no intention of returning and, consequently, either resigned, repudiated, or abandoned her employment.

The legal test for resignation sets a high bar for employers, and was described by the Court in this case as whether a reasonable person, viewing the matter objectively, would have understood the Plaintiff to have unequivocally resigned. The Court also observed that the test for abandonment is similar, and can consider factors such as a failure to report to work, a failure to follow policies and procedures, relocation, and a lack of intention to return.

The Court applied the tests for resignation and abandonment and found that neither applied. The Court’s determination was based on the fact that the Plaintiff did not unequivocally indicate she was not returning to work.

However, the Court did find that the Plaintiff had no intention of returning to work unless her demands were met. Moreover, the terms of the Strike Notice constituted an attempt to make significant changes to the Plaintiff's duties as outlined in the employment contract, which was incompatible with her continued employment. In the result, the Court concluded that the Plaintiff repudiated the employment contract and denied the claim for wrongful dismissal.

The Court went on to dismiss the Defendant's claims for wrongful resignation, noting that in order to make out such a claim the employer must demonstrate that they suffered losses, or costs in excess of what they saved by not paying the employee's salary during the notice period. Given that the Plaintiff was replaced almost immediately and there was insufficient evidence to conclude that the Plaintiff organized the work stoppage herself, the Court was unwilling to attribute any of the Defendant's losses to the Plaintiff's departure.

Check the Box

The facts of this case demonstrate that identifying *when* and *how* an employment relationship comes to an end is not always a clear cut exercise. However, the Court's decision provides some helpful guidance for employers:

1. In order to withstand judicial scrutiny, a resignation of employment must be clear, unequivocal, and voluntary. A court must be convinced that a reasonable person would understand, by the employee's words or actions, they intended to resign their employment. The surrounding circumstances will therefore be of central importance to this analysis.
2. Repudiation of employment is a distinct legal concept, which is separate and apart from that of resignation. If an employee seeks to make the performance of their existing contractual obligations conditional on their employer's agreement to new terms or conditions of employment, the employee may be found to have repudiated their contract. To make out this argument, there must be evidence to demonstrate that the employee's conduct is incompatible with their continued employment.
3. Damages for wrongful resignation are exceedingly rare, and will generally only be awarded where there is evidence that: (i) the employer suffered a loss as a result of the employee's breach of contract; and (ii) that the loss exceeded the amount that the employer saved by not paying the employee's salary during the resignation notice period.

Date: April 20, 2021

Forum: Ontario Superior Court of Justice

Citation: [Anderson v Total Instant Lawns Ltd, 2021 ONSC 2933](#)

Need more information?

For more information about employment agreements, support implementing terminations of employment, or for representation in wrongful dismissal litigation, reach out to [Mark Van Ginkel](#) at 416.408.5560 or your regular lawyer at the firm.



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