CITATION: Johal v. Simmons da Silva LLP, 2016 ONSC 7835
COURT FILE NO.: CV-15-3318-00
DATE: 2016/12/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Rajinder Johal	)	
Plaintiff (Moving Party)	)	Philip R. White - Counsel for the Plaintiff
	)	
– and –	)	
	)	Nicole Simes - Counsel for the Defendant
Simmons da Silva LLP	)	
Defendant (Responding Party)	)	
	)	
	)	
	)	
	)	**HEARD:** August 3 and November 21, 2016

THE HONOURABLE JUSTICE JAMES W. SLOAN

[1] The Plaintiff brings this motion for summary judgment claiming wrongful dismissal. The Defendant brings a motion to defend the Plaintiff's motion for summary judgment and alternatively seeks summary judgment dismissing the Plaintiff's claim.

[2] In defence to the Plaintiff's summary judgment motion, the Defendant submits there are issues of credibility and key facts in dispute that require oral testimony to be resolved.

[3] At the commencement of the motion, the Plaintiff withdrew her claim for moral damages and conceded that the Defendant's acceptance of, what it terms, the Plaintiff's resignation was completed when it posted its letter of acceptance at 5:00 pm on June 8th, 2015.

The Facts

[4] In June 2015, the Plaintiff was employed as a senior family law clerk with the Defendant law firm working mainly for Mr. Clarke.

[5] The Plaintiff was 62 years of age at the time and had been employed with the law firm for 27 years.

[6] The family law group at the firm was made up of four lawyers and supported by three senior law clerks, one being the Plaintiff, and two junior law clerks. The Plaintiff had been Mr. Clark's primary law clerk since 2008 and his only law clerk since 2011.

[7] One of the four family law lawyers resigned from the firm in the fall of 2014 and a second family law lawyer gave her notice of resignation in May 2015 to be effective in July 2015.

[8] In addition, Cheryl Forsythe, a senior law clerk, was returning from parental leave very shortly.

[9] On Wednesday, June 3rd, 2015, Mr. Clark called the Plaintiff to a meeting to inform her of changes that were to be made to the family law group. Ms. Perlman, the firm's human resources manager, was also present.

[10] The parties differ somewhat in their recollection of what was said at the meeting, and what transpired on the following days.

The Defendant's Recollection of the June 3rd Meeting

and Her June 4th visit to Clark's Office

[11] It is Mr. Clark's recollection that, at the meeting, he told the Plaintiff:

a) Another lawyer had resigned from the family law group and Ms. Forsythe would be returning shortly from her parental leave;

b) He had developed a role for Ms. Forsythe to assist him with file coordination because she had experience with this type of work in the past and it was a comparable position to her previous role, which the Defendant was obligated to offer her upon her return from parental leave; and

c) She, the Plaintiff, would continue in the same role she had worked in for many years, and he, Mr. Clark would continue to be her boss.

[12] Mr. Clark further recalls that the Plaintiff advised him and Ms. Perlman that she would not work with Ms. Forsythe or go along with Mr. Clark's plan, and that she gave a few reasons.

[13] The Plaintiff left a few minutes early from work on Wednesday, June 3rd, 2015.

[14] The following day, Thursday, June 4th, 2015, the Plaintiff returned to work. While she did not seem upset and appeared calm to Mr. Clark, she removed all her personal belongings from the office, and then entered Mr. Clark's office and placed her building security pass on his desk and stated that he had placed her in an "intolerable position."

[15] When Mr. Clark asked the Plaintiff if she was resigning, she stated that she had "hit the end of the road" and then left the firm.

[16] It is Mr. Clark's recollection that the Plaintiff returned to the firm later that day and returned her security fob to the receptionist, instructing her to give it to Mr. Clark.

[17] The Plaintiff did not return to work later on Thursday, June 4th; Friday, June 5th; or Monday, June 8th, 2015. She did not contact any partner or human resources personnel of the firm during that period.

The Plaintiff's Recollection of the June 3rd Meeting and the Defendant's June 4th Visit to His Office and Submissions

[18] The Plaintiff's recollection is that:

a) Mr. Clark informed her about the notice of resignation of a family law lawyer;

b) He then proceeded to tell the Plaintiff that Ms. Forsythe would be responsible for assigning work to her;

c) He referred to Ms. Forsythe's role as project manager and not file coordinator, and that as project manager, Ms. Forsythe would be responsible for assigning tasks to the Plaintiff.

[19] The Plaintiff denies that Mr. Clark told her she would continue to report to him.

[20] The Plaintiff returned to the office on Thursday, June 4th, 2015, at approximately 9:00 am. She was upset and went to her office. When Mr. Clark arrived shortly thereafter, he went directly to his office without acknowledging her.

[21] At approximately 9:30 am on June 4th, 2015, another law clerk entered Mr. Clark's office. The Plaintiff testifies that she heard him tell her that she was going to be working closely with him. This further upset the Plaintiff because she had been the only law clerk supporting Mr. Clark since 2011.

[22] When Mr. Clark finished his meeting with the other law clerk, the Plaintiff went into his office and handed her security pass to him. At that point, she collected her personal belongings and went home.

[23] The Plaintiff denies telling Mr. Clark that she “was at the end of the road” or that he had put her in an intolerable situation, when she handed him the security pass.

The Plaintiff’s Submissions on the Facts

[24] Even though the reason that the Plaintiff and Ms. Forsythe did not get along may have seemed trivial to Mr. Clark, he was aware of the fact that they did not get along.

[25] The Plaintiff submits that the differences in the recollections between the Plaintiff and the Defendant of any meeting are irrelevant.

[26] With respect to the differences in recollection of what took place on June 3rd, 2015, the Plaintiff states that the only relevant detail is that she got upset.

[27] With respect to what transpired on June 4th, 2015, if viewed narrowly, the Plaintiff returning her security pass and removing her belongings might look like a resignation. However, it is incumbent upon the employer to look at the larger picture.

[28] She submits that the larger picture must be viewed by an objectively reasonable person viewing all of the surrounding circumstances.

[29] Those circumstances include:

a) Mr. Clark’s knowledge in advance of June 3rd, 2015, that she would be upset;

b) Mr. Clark’s knowledge that her relationship with Ms. Forsythe had been acrimonious;

c) Mr. Clark's recognition that she would need time to consider the changes, as evidenced by him telling her to think about the matter, and that they could speak again the next day;

d) The Plaintiff's not considering resigning from the firm at any time prior to June 3rd, 2015;

e) The Plaintiff's extremely long time of service to the firm: 27 years;

f) The Plaintiff's reliance upon the compensation she earned from her employment;

g) The fact that the Plaintiff, upon the alleged resignation, did not have another job immediately available, so she would have to look for new employment at age 62;

h) That the Plaintiff did not provide the firm with a written notice her resignation—she just walked out of the firm;

i) That the Plaintiff did not provide the firm with at least two weeks' notice of her resignation;

j) That the Plaintiff did not say goodbye to her colleagues;

k) That the Plaintiff's sudden departure was out of character, since there is no evidence she had ever threatened to resign or had previously walked out of the office during her prior 27 years of service;

l) That when the Plaintiff walked out, she knew that another family law clerk had previously walked out of the firm for several days and had been allowed to return to work;

m) That the Plaintiff spent the weekend after her departure crying and found it difficult to eat or sleep;

n) That Mr. Clark aggravated the situation, when after the heated June 3rd meeting, he did not acknowledge the Plaintiff or try to meet with her, but instead met with another law clerk leading the Plaintiff to believe she was being discarded;

o) Mr. Clark's failure to take the time and make an effort to ensure that she fully understood the restructuring changes;

p) That the firm never set out the changes in writing or attempted to schedule a follow-up meeting with her after her emotions had cooled to ensure there were no misunderstandings;

q) That when the Plaintiff handed Mr. Clark her security pass, he made no attempt to question her about her emotional state or her sudden decision to leave the firm without notice; and

r) That Mr. Clark let the Plaintiff walk out, despite knowing that she would require time to consider and absorb news of the changes.

Legal Issues

[30] If this is an appropriate case to be heard on a summary judgment basis, the main issues in this case, aside from the issue of damages is whether or not the plaintiff resigned and if she did resign did she effectively resile from that resignation.

The Case Law

[31] In *Gebreselassie v. VCR Active Media Ltd.* (2007), 161 A.C.W.S. (3d) 261, [2007] O.J. No. 4165, Justice Hill stated, at paragraphs 43-44 [citations omitted]:

> A valid and enforceable 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 … Whether words or actions equate to resignation must be viewed contextually — the totality of the surrounding circumstances are [*sic*] relevant to determine whether a

> reasonable person, viewing the matter objectively, would have understood the employee resigned … .
>
> Whether a resignation is clear and unequivocal requires a fact-driven assessment of all relevant evidence. The plaintiff was a 10-year employee working exclusively for the defendant. In April 2005, he was supporting a family and had no other employment immediately available. Common sense and experience would suggest an employee in the circumstances would not voluntarily quit his employment. That said, the defendant's position is to be preferred.

[32] In the *Gebreselassie* case, the court ultimately ruled against the Plaintiff, stating that it was "unable to accept the credibility of the plaintiff's account," at para. 45. The court further stated that the Plaintiff had become a "frustrated and disgruntled employee no longer prepared to work for the defendant."

[33] In the *Gebreselassie* case, the Plaintiff was unhappy about his Christmas bonus, his workload, unfair shift changes and unfounded allegations about his work performance.

[34] The underlying facts of the *Gebreselassie* case stand in marked contrast to the case at bar, except for the facts that in leaving his workplace, Mr. Gebreselassie handed in his keys, took home his personal sweater, left work partway through his shift and did not report the next day.

[35] Justice Hill went on to state, at para. 49, "I accept that a resignation during a spontaneous outburst in highly charged emotional circumstances can undermine its essential voluntariness …" [citations omitted].

[36] The Plaintiff argues that, in the case at bar, the Plaintiff's resignation was emotionally charged. In contrast, the Defendant submits, that by her words and actions the Plaintiff clearly meant to resign.

[37] The Ontario Court of Appeal in the case of *Kieran v. Ingram Micro Inc.* (2004), 32 A.C.W.S. (3d) 706, 189 O.A.C. 58, at para. 34, stated:

> Even if the trial judge had been correct in finding a resignation at law, it is clear, as counsel agreed, that an employee may resile from a resignation, provided the employer has not relied upon it to its detriment …

[38] At para. 30, the Court of Appeal also stated:

> Whether words or actions equate to a 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.

[39] In the British Columbia case of *Bru v. AGM Enterprises Inc.*, 2008 BCSC 1680, a meeting was called to discuss a conflict, the Plaintiff asked to go home for an hour because she was upset, but called back within the hour to say she was not well enough to return to work that day.

[40] At paragraph 110, the Court stated that there are concurrent duties imposed on the employee and the employer to clarify their intentions.

[41] At paragraphs 109 and 119, the court stated:

> In summary, the broad understanding I take from the authorities regarding the validity of an employee resignation is this: an employer faced with a declaration of resignation cannot always take it at face value, but should consider the context and all the surrounding circumstances. These are some of the ways in which a resignation can be unclear or ambiguous: in the manner of its expression, or because of conflicting statements made by the employee about resignation; or because of the circumstances it was made in, for example, in the state of strong emotion/mental distress that would raise a doubt in the mind of a reasonable and fair-minded person about the employee's true intention; or because of some other relevant circumstance, such that an employee or as an objective person, acting fairly and reasonably, would seek a clear understanding of the employee's intention before accepting and acting on it.
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> …
>
> This hear nothing, see nothing, speak nothing response might be considered in certain lights the kind of hardball frowned on by the decisions, so I hasten to add I find no malice on the part of the employer. In tortious terms, the Defendant, Market's conduct might be characterized

> as a form of careless disregard. In contractual terms it was a breach of the term in reasonable contemplation by the parties to fairly regard one another's interest; and that the Defendant Market would act fairly, and reasonably, and be mindful of the Plaintiff's vulnerability and obvious emotional distress in just such circumstances. A requirement of fair-minded objectivity in the circumstances is not too formless or intangible a footing for an employer to stand on when attempting to view objectively the employee's words and all the known circumstances surrounding them to see if the employee had truly resigned. After all, in the vast majority of situations, it will be perfectly clear to anyone but the intentionally obdurate that an employee has clearly resigned. However, in some cases doubts will reasonably present themselves. Here, there were enough facts standing clearly out in the midst of the surrounding circumstances at the time the November 13 statement was made, and the three days following to render Ms. Bru's statement equivocal.

[42] The plaintiff in the *Bru* case, like the *Evans* case cited below, submitted medical evidence to the court to assist it in determining what steps the employer should have taken.

[43] In this case, the Plaintiff points out that Mr. Clark did not question the Plaintiff on anything. He took no steps whatsoever notwithstanding his 27-year relationship with the Plaintiff and all of the facts that he knew or should have reasonably contemplated with respect to the Plaintiff's situation, either on June 4th or the following days.

[44] The Defendant submits, based on Mr. Clark's assessment that the Plaintiff appeared calm and that she took all her of her personal belongings, returned her office keys and did not show up for work or contact the defendant for six days, that it was reasonable for the Defendant to conclude that she had resigned.

[45] In the Newfoundland case of *Evans v. Avalon Ford Sales (1996) Ltd.*, 2015 NLTD(G) 100, the Court stated, in its conclusion respecting the Plaintiff's resignation or dismissal, at para. 117:

> 1. The duty of good faith and fair dealings was an implied fundamental term of the Plaintiff's contract of employment;
>
> 2. Mr. Evans resigned but his resignation was neither voluntary nor unequivocal;

> 3. Whether the Plaintiff's resignation was involuntary (as I have found) or voluntary, in the circumstances of confusion and uncertainty, in this case, the Defendant was required to make further inquiries and act with consideration in response to the resignation; and
>
> 4. The Defendant breached its duty of good faith and fair dealing in failing to give the Plaintiff time to cool off and reconsider, and failing to make further inquiries and act with consideration in response to the resignation. Alternatively, the Defendant's actions represented careless disregard for the employee, similarly characterized as a breach of this implied term of their contract.

[46] In the *Evans* case, after being reprimanded, Mr. Evans resigned from his job immediately. At the time of his resignation, Mr. Evans was in fact experiencing significant stress symptoms of a cardiac nature and had experienced cardiac problems previously.

[47] In this case, the Plaintiff has not produced any medical evidence. When she was asked to produce some, she refused.

[48] The Defendant submits that they waited five days before accepting the Plaintiff's resignation and that they had no obligation whatsoever to contact her because she had unequivocally resigned by her words and actions on June 3rd and 4th.

[49] The Defendant submits that it does not owe a paternalistic duty to the Plaintiff to second-guess what she is thinking, and it does not owe a duty of good faith to ask an employee if he or she wants to reconsider after a clear resignation.

[50] The Plaintiff submits that she felt, rightly or wrongly that she had been pushed aside. Other than two law clerks who called her, no one in a managerial/official position attempted to contact her.

[51] The Plaintiff submits it is particularly disconcerting, that after 27 years of working for and with Mr. Clark, that he did not see fit to try to contact her or

discuss the situation with her in any way, even when she was in his office on June 4th.

[52] The Plaintiff submits that even if the Court finds that she did resign, she should be allowed to resile from the resignation. (See *Kieran*, *supra*.)

[53] In the case of *Reis v. Stratford General Hospital* (2007), 163 A.C.W.S. (3d) 259, 2007 CarswellOnt 8645 (Ont. S.C.J.), the Plaintiff, after 20 years of employment submitted a letter of resignation on March 5th, 2001, effective March 16th, 2001. The Defendant accepted the resignation which the Defendant received on March 8th, 2001, but on March 7th, 2001, the Plaintiff had delivered a letter to the Defendant withdrawing her resignation. The Defendant refused to accept the withdrawal and maintained his position that the Plaintiff was terminated.

[54] The Court, relying on the *Kieran* decision, stated the following at paras. 19 and 20:

> … [A]n employee may resile from a resignation provided the employer has not relied upon it to its detriment [citation omitted].
>
> I do not think there can be any doubt that the text of the plaintiff's letter of March 5, 2001 conveys a clear and unequivocal intention to resign. I am also satisfied that she gave notice that she was withdrawing her resignation before the defendant had relied upon it to its detriment.

[55] In the case of *Movileanu v. Valcom Manufacturing Group Inc.* (2007), 161 A.C.W.S. (3d) 752, 2008 C.L.L.C. 210-001 (Ont. S.C.J.), after the Plaintiff said he could not do certain aspects of his new job he was provided with a letter of resignation dated January 10, 2006.

[56] There was a further discussion between the parties but in the end of the Defendant stated it was too late. On January the 11th, 2006, the Plaintiff returned to the plant but could not get in because his pass had been cancelled.

[57] The Plaintiff said he had talked to a lawyer, his doctor and his family and that he would do the work of the supervisor. Nonetheless, the Defendant refused to reinstate him.

[58] The court found, at paras. 58 and 59, that the Plaintiff had resiled from his previous position and would take the job of supervisor. The court further found that the company had not taken any action to its detriment and had not incurred any expenses caused by the Plaintiff.

The Defendant's Position on the *Kerr* and *Kieran* Cases

[59] Unlike the Plaintiff, who submits that *Kieran* is good law in Ontario and *Kerr* is not, the Defendant submits they are both good law in Ontario.

[60] The Defendant submits that it's all about timing. In this case a major factor from a timing point of view is that on June 8th, 2015 at 5:00 pm the Plaintiff's resignation was accepted.

[61] While the Plaintiff argues that even if there was acceptance of the resignation, the Defendant must still show detriment. The Defendant disagrees.

[62] The Defendant submits that the Plaintiff can resile from her resignation if the employer has not already done one of two things:

1. Either accepted the Plaintiff's resignation, or

2. Relied on the Plaintiff's resignation to its detriment.

[63] The Defendant further submits that if either of those events happen before the plaintiff tries to resile, she simply cannot resile.

[64] The defendant relies on several passages in *Kerr v. 2463103 Nova Scotia Ltd. (c.o.b. Valley Volkswagen)*, 2015 NSCA 7. . In *Kerr*, the employee argued, "…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" (para. 11).

[65] To that argument, the Nova Scotia Court of Appeal responded, at para. 12:

> With respect, the appellant's statement of 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 a the communicated acceptance of a valid offer [citation omitted]. Whether or not a party relied upon an offer to its 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.

[66] The appellant in the *Kerr* case attempted to support her position with a passage from Stacy Ball's, *Canadian Employment Law* text, (Toronto: Canada Law Book Ltd., 2013), at 8-10, which ends with the sentence, "An employee may resile from the resignation, provided the employer has not relied upon it to its detriment."

[67] In response to this submission, the Nova Scotia Court of Appeal stated the following at paragraphs 14 and 20 of their decision:

> 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.
>
> …
>
> 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 the employer's detrimental reliance only arises if the employee's resignation has not been accepted.

[68] In *Kieran*, the Ontario Court of Appeal, after reviewing the evidence, concluded that Mr. Kieran had not resigned.

[69] The Court stated, at para. 33:

> In those circumstances, given the principle that a resignation must be clear and unequivocal, it cannot be said that Mr. Kieran's statements amounted to a resignation. Viewing his statements contextually, Mr. Kieran did not resign, and would not have been seen by a reasonable person to have done so.

Detrimental Reliance

[70] It is the position of the Defendant that it accepted the Plaintiff's resignation by mailing its letter of acceptance of her resignation effective 5:00 pm on Monday, June 8th, 2015.

[71] The Plaintiff did not get legal advice until Tuesday, June 9th. That afternoon, she then wrote an email to Mr. Clark resiling from her resignation.

[72] The Plaintiff submits the Court must look at what took place between 5:00 pm Monday afternoon and early Tuesday afternoon to determine if there was any detrimental reliance by the Defendant.

[73] The Defendant states that its detrimental reliance consists of the following:

a) The firm notified a junior law clerk who was on probation that her employment was secure;

b) The firm began informing clients of the Plaintiff's departure;

c) The firm notified its staff that the Plaintiff had resigned (so rehiring her would have been confusing and would decrease staff morale because the Plaintiff had strongly indicated her desire not to work at the firm and not to work with a particular colleague); and

d) Rehiring the Plaintiff would encourage employees of the firm to resign without notice as they would not be subject to any repercussion for such actions.

[74] With respect to notifying the junior law clerk, the Plaintiff points to paragraph 17 of Mr. Clark's affidavit, where he states that the firm did not intend to terminate any of the law clerks. In addition, the assurance to the junior law clerk was made Friday, before the acceptance of the Plaintiff's resignation.

[75] With respect to notifying clients of the firm, the Defendant was unable to advise how many clients may have been notified and why that action would be detrimental. From a practical point of view, since the acceptance of resignation took effect at 5:00 pm (from the Defendant's perspective) and it received an email from the Plaintiff on Tuesday afternoon, there would have been very little time to notify very many clients.

[76] In addition, since there were other law clerks available, if, in the unlikely event that a client had any concerns about the Plaintiff working on his or her file, Mr. Clark could have simply reassigned that work to another clerk.

[77] There is no evidence that staff morale would have been decreased, and essentially the Defendant admits that this is speculation. It is equally arguable that moral would be increased, when the other employees saw how their employer dealt with a 27-year employee.

[78] Similarly, there is no evidence whatsoever that rehiring the Plaintiff would encourage other employees to resign without notice because (as the Defendant argues) it would appear that there would be no repercussions for such actions.

Quantum of Damages

[79] The Plaintiff submits her damages should be between a 22- to 26-month salary continuation. She appended a chart at page 27 of the Plaintiff's factum to bolster that summation.

[80] The Defendant submits that if the court determined that the Plaintiff is entitled to damages it should be limited to 16 months' salary, and should be reduced for her failure to mitigate.

[81] The issue of mitigation is a difficult issue in this case.

[82] From the Plaintiff's point of view she argues:

a) She lives in Brampton;

b) She is 63 years of age;

c) She was a 27-year employee;

d) She had a spotless employment record with the Defendant;

e) She worked extremely closely with and enjoyed working for Mr. Clark; and

f) She is a nervous driver and does not like to drive on highways which limits her ability to get to get to many legal offices in her area.

[83] From the Defendant's point of view it argues:

a) It is unbelievable that the Plaintiff has been unable to find an appropriate position since June 2015, over 16 months ago;

b) They arranged and paid for a company to assist the Plaintiff find another position;

c) The plaintiff has excellent work skills as a senior family law clerk;

d) There are many law clerk positions open within a reasonable geographic area including downtown Toronto;

e) The plaintiff did not want to work in downtown Toronto;

f) Positions, particularly those in downtown Toronto, would pay the Plaintiff a similar or greater amount of annual remuneration;

g) Even if the remuneration would be less, the Plaintiff was obligated to take a position in an effort to mitigate her damages;

h) The plaintiff submitted very few job applications;

i) Although the Defendant offered to give a verbal reference and gave a reference letter, the Plaintiff did not avail herself of the verbal reference and did not supply the letter of reference with any applications;

j) The Plaintiff could have obtained a job with Elizabeth Sachs; however, the Plaintiff did not want to drive to Orangeville, nor did she try to negotiate a higher salary than the starting salary which was $11,000 less per year than her previous employment;

k) The Plaintiff received a voicemail request to come in for an interview from Dale, Streiman and Kurz LLP, but did not follow up on the voicemail message; and

l) The Plaintiff was offered a job with Aastha Lawyers, a firm which is located relatively close to the Plaintiff's home, at a starting salary of approximately $42,000, approximately two thirds of what she was making with the Defendant.

Defendant's Position on Summary Judgment

[84] The Defendant submits that this case should not be decided on a summary judgment basis for the following reasons:

A. There is a dispute as to what was said on June 3rd and 4th, 2015.

The Defendant submits that voluntary resignation must be clear and unequivocal and since the words that were spoken on June 3rd and 4th are in dispute, those words go to the heart of whether it was a resignation.

B. There is a dispute as to the emotional state of the Plaintiff on June 4th, with the Plaintiff saying she was upset and in distress and Mr. Clark saying she seemed calm.

The Defendant therefore submits that it would be extremely difficult for the court to determine if the Plaintiff was upset on June 4th, without seeing her as a witness, hearing her oral testimony, and then deciding on credibility.

C. There is a large dispute with respect to the mitigation efforts of the Plaintiff.

This is particularly so when a legal recruiter working with the Plaintiff set out in an email dated October 1, 2015 that the Plaintiff "was also not completely prepared to compete with and sell her capabilities as it was not her intention at this point in her life to seek new employment" (Tab C-12 of the Motion Record of the Defendant Responding Party).

> The Defendant also disputes how the Plaintiff searched for a job and questions why she did not apply for certain positions, particularly certain positions flagged by the Defendant.
>
> In short, the Defendant submits, that if the Plaintiff had taken reasonable steps she would have very likely obtained a commensurate position.

[85] The Defendant relies in part on the case of *Lewis v. Laverne Heideman & Sons Ltd.*, 2015 ONSC 3752, however in that case as set out in paras. 58 and 59, there were issues of just cause, the Plaintiff's workplace behaviour, and the events of three meetings which left many material facts in dispute. That is quite different from the case before me.

[86] The Defendant points out that *Kerr*; *Newman v. Bend All Automotive Inc.* (2015), 259 A.C.W.S. (3d) 485, 2015 CarswellOnt 16283 (Ont. Sm. Cl. Ct.); *Gebreselassie*; and *Bru* were all decided after trial and not on a summary judgment basis.

[87] The Defendant therefore submits that the appropriate method to dispose of this action is by trial and not by the summary judgment procedure.

[88] In the event that the Court finds that this is an appropriate case for summary judgment, the Defendant submits:

a) The Plaintiff resigned;

b) The Defendant accepted the Plaintiff's resignation before the Plaintiff attempted to resile;

c) The Defendant relied on the Plaintiff's resignation to its own detriment; and

d) If the court finds Plaintiff was terminated, she failed to mitigate.

Did the Plaintiff Resign

[89] The Defendant submits that Mr. Clark was clear when he spoke to the Plaintiff on June 3rd, 2015, when he told her she would report to him, her work would not change, and that Ms. Forsythe would coordinate the files because she had experience in coordinating files.

[90] The Defendant submits that the Plaintiff made it clear that she would not work with this new plan; however, it has been unable to explain why, if that was her position on June 3rd, she returned to the office on June 4th.

[91] The Defendant referred in part to the notes of Sue Perlman at page 175 of the Motion Record of the Defendant Responding Party. The court was referred to the sentence, “Rajinder [the Plaintiff] once again said that Justin’s [Mr. Clark] plan was not going to work for her and that Justin needed to come up with something else to offer her.”

[92] The Defendant submitted that in light of this quote, the fact scenario is similar to the threatening/ultimatum cases rather than to the emotional outburst cases.

[93] The Defendant did not, however, refer the Court to the sentences immediately following the above quote which read, “She [the Plaintiff] again asked for specifics as to who would be doing what job. Justin told her that the details would have to be worked out once Cheryl got back. Nothing is in writing at this point as it is a work in progress. Rajinder told Justin that he is not reassuring her and not taking her feelings into consideration.”

[94] Mr. Clark, in his notes of the June 3rd meeting, included at page 36 of the Motion Record of the Defendant Responding Party, noted that the Plaintiff was

looking for reassurance. He wrote, “She will no longer be happy coming to the office. Does not want to spend her last ‘couple’ of years this way.”

[95] It is Mr. Clark’s position that the Plaintiff left slightly early that day and went home to discuss the matter with her husband and sleep on it. He states she then returned to the office on June 4th and through clear words and actions indicated her decision to resign.

Findings

Summary Judgment

[96] Based on the principles enunciated in *Hryniak v. Mauldin*, 2014 SCC 7, I am satisfied that I have sufficient evidence before me to decide all of the issues argued, except for the issue of damages/mitigation.

Detrimental Reliance

[97] I agree with the Defendant that *Kerr* correctly sets out the law of Ontario, in that, if there has been a resignation and if the employer has accepted that resignation, then the employee is precluded from resiling from his/her resignation; in those circumstances the employer would not have to show detrimental reliance.

Did the Plaintiff Resign?

[98] As set out in *Gebreselassie*, “A valid and enforceable resignation must be clear and unequivocal.” To be clear and unequivocal, it must “objectively reflect an intention to resign” and the words or actions that may equate to resignation “must be viewed contextually”.

[99] *Bru* confirmed that the circumstances must be viewed contextually and gave as an example where a resignation is made “in a state of strong emotion/mental distress that would raise a doubt in the mind of a reasonable and fair-minded person about the employee’s true intention”, at para. 109.

[100] The court in *Bru* went on to state, “This hear nothing, see nothing, speak nothing response might be considered in certain lights the kind of hardball frowned on by the decisions…” at para. 119.

[101] Mr. Clark’s assessment that the plaintiff appeared calm can only be viewed as suspect.

[102] On the evidence before me, it was to the Defendant’s financial advantage if the plaintiff resigned, since the evidence is clear that at least currently, the firm was top-heavy with family law clerks. Therefore if one resigned “of her own free will” the firm would not have to pay any severance and of course if she resigned the defendant would not have to continue to find work for her and pay her ongoing salary.

[103] At the time of the alleged resignation, Mr. Clark’s family law section of the firm had recently lost two family law lawyers and had a senior family law clerk returning from maternity leave.

[104] So when the “opportunity” of accepting the plaintiff’s resignation arose, Mr. Clark and/or the remaining management members of the firm, by their inaction decided to “let sleeping dogs lie” and simply accept what they thought was a resignation, after what they thought was a reasonable length of time.

[105] For the following reasons, I find that when viewing this matter contextually, a reasonable person would not have viewed the Plaintiff’s action as a voluntary resignation.

a) The Plaintiff was 62 years of age;

b) She had been employed with the firm for 27 years;

c) She was a senior family law clerk;

d) She had been Mr. Clark’s only law clerk since 2011;

e) She was earning approximately $60,000 per annum;

f) Her employment was close to her residence;

g) She was called into a meeting without any particular notice;

h) The information she received in the meeting was oral;

i) The information about the plan going forward had not been finalized;

j) There was an indication that the Plaintiff would be working with Ms. Forsythe with whom she did not particularly get along, a fact known to Mr. Clark;

k) Whatever follow up meeting Mr. Clark promised to arrange on June 3rd, he did not arrange;

l) On June 4th, Mr. Clark did not make any attempt to discuss the previous day's meeting with the Plaintiff;

m) On June 4 when the Plaintiff went into Mr. Clark's office he did not try to have her sit down so they could discuss the matter nor did he attempt to set up a subsequent meeting;

n) Neither Mr. Clark nor anyone at the management level of the firm attempted to contact the Plaintiff at any time after June 4th;

o) The Plaintiff had never threatened to resign in her previous 27 years;

p) In all likelihood, the Plaintiff would not have had a job immediately available to her;

q) She did not provide the firm with written notice or even verbally state that she was quitting/resigning;

r) She did not provide the firm with even a minimal two-week notice period; and

s) Her sudden departure was out of character.

[106] Although, as in some of the cases quoted to the court, the Plaintiff has not produced medical evidence, on the facts of this case, it was not necessary for her to do so. The Plaintiff simply needed a few days to gather her thoughts and get some advice.

[107] While I agree with the Defendant that it does not owe a paternalistic duty to the Plaintiff, on the facts of this case, it was required to do more to determine the Plaintiff's true and unequivocal intention.

[108] As stated in the *Evans* case, the circumstances here cried out for further inquiry by the Defendant.

[109] Therefore, on the facts of this case I find that the Plaintiff did not resign.

[110] Unless the parties are able to agree on the quantum of damages, I order that there shall be the trial of an issue on the quantum of damages.

[111] If the parties are unable to agree on costs, Mr. White shall forward his **brief** submissions on costs to me by December 19, 2016. Ms. Simes shall forward her **brief** response to me by December 21, 2016. Mr. White shall then forward his reply, if any, to me by December 23, 2016. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca.

James W. Sloan

Released: December 14, 2016

CITATION: Johal v. Simmons da Silva LLP, 2016 ONSC 7835
COURT FILE NO.: CV-15-3318-00
DATE: 2016/12/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Rajinder Johal
Plaintiff

(Moving Party)

– and –

Simmons da Silva LLP

Defendant (Responding Party)

REASONS FOR JUDGMENT

James W. Sloan J.

Released: December 14, 2016