IF YOU ARE ABOUT TO BE DISMISSED, DO NOT RESIGN

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In our business, our bread and butter is taking unjustified dismissal cases to Mediation and to the Employment Relations Authority. From time to time, I get cases coming across my desk where an employer has initiated a disciplinary process and then moved to decide to terminate the employee's employment, and irrespective of whether a decision to terminate is justified, it's then at the last minute, the employee at their free will resigns or says that they are resigning for which the employer accepts that resignation. The effect of this is that there's no case to be taken from that point.

A dismissal occurs when there is a "sending away" of a worker so the termination of the employment occurs at the initiative of the employer. This was held in Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich ERNZ Sel Cas 95, at 102-103 and often referred to in Employment Relations Authority and Employment Court decisions in determining the outcome of unfair dismissal cases. The way the ERA and Court sees, it is that the context and content of the communication between the worker and the employer are considered on an objective standard to discern what was more likely than not to have occurred in the facts of any particular case.

An example of this is a recent case in the Employment Relations Authority in late 2020. This was Remihana v Rigweld Engineering Limited [2020] NZERA 485. I will briefly discuss what happened and how a 'resignation' seriously inhibited the employee's ability to make a claim for unjustified dismissal.

The employee worked on major building and construction projects as a rigger. An initial on-site drug test that was undertaken led to a non-negative result as the employee had smoked cannabis the evening before. Without further laboratory confirmation procedures being undertaken, the employee having admitted smoking cannabis outside of work was invited to a meeting where the employee was on notice that termination of employment could be a possible outcome of the meeting.

During the meeting, the employer came to an outcome that termination of employment would be appropriate, however, there was a discussion where the employer suggested that the employee could instead resign on the basis that it would look better on the employee's record.

The employee was sent away. The reason why this was held to not amount to a dismissal was that when the employee arrived home, the employee then sent an email to the employer stating that he was resigning effective immediately for personal reasons. The Authority found that the impetus for resignation came from the employee and there was no pressure from the employer to resign.

If the word 'resign' appears in any of the contemporaneous communication, documents, or evidence, then an employee bringing an unjustified dismissal claim carries a lot of risk. We say, "don't resign".

But a dismissal looks bad on record

While we often hear that dismissal would look bad on an employee's employment history, there's a different approach that can be undertaken, which is as follows:

1. Do not resign
2. If the dismissal can be challenged on procedural or substantive grounds, we will raise a personal grievance for unjustified dismissal
3. We will negotiate with the employer to achieve a settlement before, at, or after Mediation
4. In the terms of settlement, it can be agreed that employment ended by way of resignation (even though it didn't)
5. Often we also achieve a reference or certificate of service as well for the employee
6. If a settlement cannot be achieved, an employee can take the matter further in the Employment Relations Authority

The bottom line, don't resign.

> "Do not resign! Talk to us first"

But what about constructive dismissal?

A constructive dismissal occurs when an employer places an employee in a situation where the employee has no option but to resign. In Auckland etc Shop Employees IUOW v Woolworths (1985) ERNZ Sel Cas 136, [1985] 2 NZLR 372, the Court of Appeal categorised constructive dismissal as occurring in the following situations:

1. An employer gives an employee a choice between either resigning or being dismissed
2. An employer follows a course of conduct to deliberately coerce an employee into resigning
3. A breach of duty by an employer to an employee leads the employee to resign

Where an employee claims constructive dismissal, the employee carries the onus to satisfy the Court that their resignation amounted to a constructive dismissal and if successful the onus will then shift to the employer to justify the employer's actions (Weston v Advkit Para Legal Services Ltd [2010] NZEmpC 140).

Further tests of establishing a causative link and whether a resignation is reasonably foreseeable also comes into play in establishing a constructive dismissal claim. In Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (1994) 4 NZELC (digest) 98,265, [1994] 1 ERNZ 168 the Court of Appeal said that these two questions must also be asked and satisfied:

1. Was the resignation caused by a breach of duty on the part of the employer?
2. Was the breach of duty by the employer sufficiently serious to make it reasonably foreseeable that there was a substantial risk of resignation?

So while we say "don't resign", there are some cases we will draft an employee's resignation letter and later claim constructive dismissal where the facts of their case marry up with meeting the appropriate legal tests. But taking this approach must be very well considered. Constructive dismissal is a difficult claim for an employee to make.

If you wish to resign and to make a claim against your employer, then please talk to us first before resigning.

What we can do for employers and employees

While we take cases for employees and often do so on a 'no win no fee' basis to chase compensation, lost wages, and costs, we also defend employers and give appropriate advice to employers on how to use 90-day trial periods correctly.

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court.

Whether you're an employee or employer and you need assistance with any employment issue, we're here to help.

No matter the situation, we recommend you speak to us for professional advice before you take action. ■

For more details, contact Lawrence Anderson on 0800 946 549 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.