

When Resignations Become Dismissals

Generally, if an employee resigns from their employment they cannot later sue for unfair dismissal. However, in certain circumstances, an employee's resignation may be deemed a dismissal in what is known as a forced resignation or a constructive dismissal. Under section 386(1)(b) of the *Fair Work Act 2009* (Cth) (**the Act**), the definition of dismissal will extend to circumstances in which the employee resigned from their employment, but was forced to do so due to conduct or a course of conduct engaged in by their employer. Whether an employee was forced to resign will depend upon a variety of factors and the particular facts of the matter.

When may be a resignation be deemed as forced

The onus is on the employee to establish that the resignation was forced and done involuntarily. The threshold for a forced resignation is high as it is generally accepted that a resignation is done at the employee's initiative. It must be proved that an employee had no effective or real choice but to resign from their employment and that the cumulative effect of the employer had made the employee's situation so insufferable as to make the continued employment untenable. For example, Susan Moriarty & Associates acted for an employee who had been instructed to attend a meeting at which a letter of resignation bearing his name was handed to him. The employee was told that if he did not sign the letter, that he would be dismissed for misconduct. The employee signed the letter. As his lawyers we later convinced the employer to pay him damages for unfair dismissal on the basis that the employer's representative had used a combination of intimidation and oppression to secure the employee's resignation.

The employer's conduct must be considered to determine whether termination of the employment relationship was the probable result of the employer's conduct. An important feature is that the act of the employer results directly or consequentially in the dismissal of the employment and the employment relationship is not voluntarily left by the employee. The question to be asked is whether the employee would have remained employed had the employer not taken such action. This will determine whether the resignation was forced upon the employee through the conduct of the employer and that the employment relationship was therefore terminated at the employer's initiative. The employer's conduct can be particularly relevant in circumstances where spouses work together at the same company which is not infrequent these days. If the wife was to allege domestic violence and there was verifiable proof of the violence, an employer who refused the wife's request to work from home so that she could avoid contact with the estranged husband and who then subsequently resigned, may find that a Commission would be sympathetic to the wife's claim that she had been constructively dismissed.

Heat of the moment

In situations where a resignation has been expressed in temper, in the heat of the moment, or under extreme pressure, it may be unreasonable for an employer to assume such a resignation and accept it. This occurs in limited circumstances and the employee's state of mind may be relevant such as evidence of significant distress. A reasonable period of time should lapse and employers may be required to make further enquiries and confirm whether resignation was really intended. In a discrimination claim lodged by a father whose request for time off to work to take his sick child to hospital had been refused, the Commission accepted that the father had not abandoned his employment as the employer asserted but had been forced to take an unauthorized period in order to attend to a pressing family matter. The Commission rejected the employer's assertion that the employee had constructively resigned, finding that deeming his leaving the workplace in the circumstances proved at hearing, as a resignation was discriminatory and therefore unlawful.

What is not a forced resignation

Employees may feel unsatisfied or unsettled in their environment prior to resignation but this will not result in a finding of forced resignation. The following are examples of employees who were deemed not to have resigned by force:

- an employee who resigned rather than attending a disciplinary interview;
- an employee who resigned after being prohibited access to the workplace, suspended, and subject to a disciplinary investigation;
- an employee who resigned after being placed on a performance management plan; and
- an employee who resigned due to a failure to pay wages on time (one or days?? on each occasion).

Employers are generally permitted to accept resignations which are clear and unambiguous with the onus on employees to establish that their resignation was not voluntarily.

For more information on forced resignations or any other employment questions, contact Susan Moriarty & Associates and speak with one our employment lawyers.