"Cooling off" periods are warming up

A recent decision from the Employment Court decision presents a new approach to "cooling off periods."

Traditionally, and in order to minimise the risk of a personal grievance of unjustified dismissal, the prudent employer would allow an employee who had resigned "in the heat of the moment" with an opportunity to cool off and reconsider. In many instances this will still be the safe and sensible approach, especially if the employee is one the employer would like to retain.

But employees can no longer automatically rely on an employer's failure to provide them with a cooling off period in order to support a subsequent claim that they have been unjustifiably dismissed. Chief Judge Inglis in the Employment Court has reviewed recent cooling off cases, and made, by way of guiding principles, four observations; [1]

- Resignation is a unilateral act. Once the employee notifies their resignation (in whatever form) it is not open to the employer to claim that the resignation has no effect
- An employee is not required to justify their decision to resign, or to establish they had thought it through
- The key issue is whether, on an objective assessment, the employee had resigned. If they had resigned then there was no legal obligation for the employer to hold off on recognising the resignation, and failing to recognise the resignation could not turn the resignation into a dismissal
- Any concerns about whether a resignation arose from an employer's misconduct or breach could be addressed via the case law relating to constructive dismissal.

These principles have been applied in subsequent cases, including the March 2022 Urban Décor Limited decision.[2] In that case, the Employment Relations Authority had accepted that the two employees were unjustifiably dismissed, placing significant weight on the employer's failure to provide a cooling off period before sending out the dismissal letters. The employer challenged the decision to the Employment Court, and given some rather fortuitous timing was able to rely on the new authority from the Chief Judge.

The Court found that as the employees had both quit their jobs before leaving the work place during work hours there was no ability for the employer to reject their resignations and to declare the employment relationship ongoing. Nor was there any ability for the employer to dismiss the employee (even if the employer purported to do so by letter) as the relationship had already ended. The test is an objective test, even if the employer does not understand the employee to have resigned at the time.

As with any employment matter it is going to be important for employers to consider all of the relevant circumstances at the time. An employer who would actually prefer to retain the employee, or who thinks there might be risk of a constructive dismissal claim, might consider offering the employee an opportunity to reconsider. But in the face of a plain resignation, even in the heat of the moment, there is no longer the same obligation to automatically offer a cooling off period.

Nor is there any requirement to "accept" an employee's resignation before it takes effect. An employer can "acknowledge" the resignation in writing, in order to keep the records straight, but is not entitled to reject it. From that perspective cooling off requirements have warmed up.

Want to know more?

If this article raises any questions or concerns, please get in touch with one of our Employment Team.

[1] *Mikes Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197

[2] *Urban Décor Limited v Mingxia Yu* [2022] NZEmpC 56.