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Deemed Termination by an Employer – A recent Case Analysis

The Facts

Hired in May 2008 as a cellar hand by St. Hubertus Estate Winery Ltd., a modest-sized enterprise operated by brothers Andy and Leo Gebert in the Okanagan region of British Columbia, Hooman Haftbaradaran was quickly promoted by the spring of 2009 to the position of the winery's winemaker. As the winemaker at St. Hubertus, he held a senior position that involved making significant decisions including the grapes that would be used to produce a wine; whether the grapes needed to be blended; when, under what circumstances, and for how long fermentation would proceed; how long the wine should be aged; when it should be bottled; and, to a degree, how the wine should be marketed.

Unfortunately, Haftbaradaran had a difficult personality as he was thin-skinned, responded badly to criticism, tended to feel under-appreciated and was prone to becoming emotional to the point of being tearful and irrational if he felt upset at work.

At a meeting with Leo Gebert in October 2009 Haftbaradaran became highly emotional and confrontational after being mildly rebuked for taking a day off without giving the employer prior notification. He accused the employer of failing to appreciate his work, and in effect dared Gebert to fire him. He had to be calmed down by Gebert and encouraged to write down what he really wanted. At a subsequent meeting, Haftbaradaran revealed a number of concerns and changes he wanted to make, including demands for certain non-salary benefits. The Geberts rejected these demands as unaffordable but did provide him with a significant pay raise.

Another crisis arose when Haftbaradaran returned to the winery in early April 2010 from a vacation that he had taken in Germany and was very upset because he felt that the brothers were insufficiently appreciative that he had spent his holiday researching winemaking in Germany and had sent back to them a selection of wines to broaden their understanding of advances that were being made.

At a meeting with Andy Gebert on April 7, 2010, Haftbaradaran again became emotional and agitated, turning a relatively minor matter into a major confrontation. Asked by Gebert to leave the office, he refused and instead talked at length about how hard he had worked for the winery and how successful his efforts had been, and complained about how he was under-valued and unappreciated. Gebert more forcefully told him again to leave, saying that he was "being a pain in the ass" and to "get the f**k out of my office and go make wine for me."

Haftbaradaran still refused to take direction from his employer and eventually lost all emotional control and dissolved into tears. Gebert tried to calm him and assured him that he would not tell anyone about the crying jag, but Haftbaradaran rejected the assurance, saying that Gebert would no doubt tell his wife. At this point Gebert lost his patience and told Haftbaradaran that if he was not prepared to take his word and was so unhappy in his position, perhaps he should look for another job.

Haftbaradaran responded by taking his cellar keys out of his pocket, placing them on Gebert's desk, and saying words the effect of which was an invitation to Gebert to fire him. Gebert again told him to get out of his office. Haftbaradaran reached out to shake Gebert's hand and, smiling, said words to the effect of "good luck making wine." The employee left the office still smiling, gathered his personal effects from his space in the wine cellar, got in his car and left the property.

The brothers discussed what had happened and wondered whether Haftbaradaran was serious about wanting to leave his employment at the winery. That afternoon, Andy Gebert sent him an e-mail saying: "I['d] just like to recap this morning's discussion in regards of your position at our winery. As discussed we have to plan your departure from our company in order to clean up all the loose ends. We hope this should be possible within the next 4 weeks. Please let us know if this will work for you or if you will leave us before this time? Failure to respond by April 9, 2010 12:00 noon will [lead] us to believe that you have already resigned your position at our winery."

Haftbaradaran hired a lawyer who wrote to St. Hubertus making it clear that Haftbaradaran believed that the winery had terminated his employment contract and

that he would not return to work. A short time later, St. Hubertus gave Haftbaradaran $1,803.65 as severance pay.

Haftbaradaran subsequently initiated a wrongful dismissal action against the winery in British Columbia Supreme Court, seeking damages in lieu of notice of six to nine months' pay, moral damages for the manner of dismissal, general, special and future care damages for intentional infliction of mental distress, punitive damages, and costs.

The Court's Decision

British Columbia Supreme Court Judge Peter Rogers ruled that neither a resignation nor a dismissal took place in Gebert's office on the day in question, but that the subsequent e-mail to Haftbaradaran did constitute a dismissal without cause.

Justice Rogers found that "[t]he exchange between [Haftbaradaran] and Andy Gebert on April 7, 2010, was equivocal as it related to the issue of resignation or termination. I find that [the employee] wanted [the employer] to be more effusive in its praise of [his] efforts and to be more deferential to his opinion. Daring Leo Gebert to fire him had worked to a limited degree for [Haftbaradaran] in the past; I find that by leaving his keys on the desk and by saying words to the effect of 'good luck making wine' [he] was trying the same gambit on April 7th. Quitting the property that day showed extremely poor judgment on [his] part, but a reasonable observer would see that action as simply another element of his strategy. I find that [Haftbaradaran's] words and actions that day did not amount to an unequivocal expression of resignation from his employment."

Rogers further determined that, "[e]qually, Andy Gebert's words and actions during the April 7th meeting were not intended to be and did not amount to termination of [Haftbaradaran's] employment. Andy Gebert was entitled to instruct [him] to leave his office that day. His use of the word 'f**k' was not personally directed at [the employee] in the sense that Andy Gebert was telling [him] that he was worthless or not deserving of basic dignity…. On the other hand, I find that his saying to [Haftbaradaran] that [he] was a pain in his ass was personally directed to the [employee]. A reasonable observer, knowing that [Haftbaradaran] was persisting in occupying the office and voicing a

litany of complaints about being unappreciated would, in my view, have agreed with Andy Gebert that at that moment [he] was, in fact, being a pain in the ass…. Finally, a reasonable disinterested observer would not have taken Andy Gebert's comment to [the employee] that if he was so unhappy at St. Hubertus perhaps he should find a job somewhere else as termination of the employment contract…. [A]n observer would take that comment as having been said in the heat of the moment and intended to encourage [Haftbaradaran] to think rationally about his complaints and actions."

However, Rogers concluded that "[t]he employer's e-mail to [Haftbaradaran] later in the day on April 7th did … change the parties' relationship. Had St. Hubertus genuinely wanted [him] to continue to work as its winemaker, that e-mail would have referred to the earlier conversation, would have acknowledged the ambiguity of the parties' positions when the meeting ended, and would have invited [him] to return to the winery to iron out their differences. Instead, the e-mail spoke unequivocally of the parties' working relationship coming to an end…. A reasonable observer, knowing what had passed between the parties earlier in the day, would have viewed the e-mail as a communication of [the employer's] decision to no longer put up with [the employee's] behaviour. The e-mail terminated [Haftbaradaran] contract of employment."

Since the employer did not allege cause for the termination, Justice Rogers ruled that [Haftbaradaran] was entitled to damages in lieu of notice. Noting Haftbaradaran's relatively short service of 23 months and young age of 38 years, but finding that his skills were in a specialized and narrow field and that it took him eight months to find a new position as a winemaker, Rogers fixed the proper period of notice at eight months, amounting to a net award of $30,684.35 after deduction of the small severance payment that he had received.

Analysis

It is well established in jurisprudence that both a resignation and dismissal must be clear and unequivocal to be effective. In the case of a resignation, the courts have held that, to be clear and unequivocal, the resignation must objectively reflect an intention to resign, or there must be conduct evidencing such an intention. Thus, as noted by

the Ontario Court of Appeal in *Kieran v. Ingram Micro Inc.*, [2004] O.J. No. 3118 (QL) (C.A.), reviewed in Lancaster's *Wrongful Dismissal and Employment Law eNewsletter*, October 6, 2004, Issue No. 63, leave to appeal to Supreme Court of Canada refused, [2004] S.C.C.A. No. 423 (QL),"[w]hether words or action equate to resignation must be determined contextually. The surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood [the employee] to have unequivocally resigned. Similarly, in the case of dismissal, both the Ontario and British Columbia Courts of Appeal have held that, while notice of termination need not use the words "you are hereby dismissed effective…" or some such equivalent, it must lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future: *Gibb v. Novacorp International Consulting Inc.*, [1990] B.C.J. No. 1705 (QL) (C.A.); and *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA), reviewed in Lancaster's *Wrongful Dismissal and Employment Law News*, July/August, 2002.

In the present case, the judge determined on the evidence that the words and actions of neither party during the meeting at issue met these standards. The employer's e-mail was a different matter, however, as it "spoke unequivocally of the parties working relationship coming to an end … [and] made no offer of, and left no room for the plaintiff to participate in, rapprochement." Justice Rogers made a specific finding as required by the courts in *Gibb* and *Prinzo* that "[a] reasonable observer, knowing what had passed between the parties earlier in the day, would have viewed the e-mail as a communication of the defendant's decision to no longer put up with the plaintiff's behaviour." Consequently, Rogers held that the e-mail terminated the plaintiff's contract of employment with the defendant.