Avoid Liability for Terminating Employees Who Disappear While on Medical Leave



Clearly accept the “resignation” of employees who abandon their job to prevent wrongful dismissal.

Resignation Without Acceptance Amounts to Wrongful Dismissal

The recent case involving a poly bag manufacturer in BC is the perfect illustration of what’s at stake. It began when a machinist reported that he wasn’t feeling well and went home for what was supposed to be a few days. He might just as well have been swallowed by the Bermuda Triangle. The company tried calling him repeatedly but he didn’t answer or seek to get in touch with his boss. Figuring that he’d abandoned the position, they trained another employee to do his job. The problem is that nobody made any efforts to communicate this to the machinist. Three months later, he tried to reclaim his job but the company refused.

The machinist didn’t resign, he was wrongfully dismissed, the BC court concluded. Disappearing from work and remaining incommunicado for so long was a clear repudiation of his contract (a fancy legal way to say resignation). The problem, the court reasoned, is that the company never accepted that repudiation. It was only after he showed up for work to reclaim his job 3 months later that the machinist learned of his supposed resignation. That was also the point that the company got around to removing him from its benefits plans and issuing him a Record of Employment (ROE).

Punchline: At the end of the day, an employee who actually resigned his employment got 15 months’ termination notice because his employer never formally accepted it [*Wong v Polynova Industries Inc*., 2021 BCSC 603 (CanLII), April 1, 2021].

The Law of the Disappearing Employee

The first key to avoiding a similar fate is understanding what the employer in *Polynova* did wrong. Let’s start with the law. Either side can terminate an employment relationship, provided that they do it in a “clear and unequivocal way.” The most direct way for employees to terminate is to expressly state their intent to resign. However, employees can also exhibit a “clear and unequivocal” intent to resign via their actions the way the machinist in *Polynova* did. The key question isn’t what was

actually on the employee's mind but whether a reasonable person would have interpreted his actions and omissions as a resignation.

But there's another important rule of contract law: When an employee resigns, aka, "repudiates" the employment contract, the employer must communicate to the employee that it accepts the repudiation to make it official. As with the intent to resign, acceptance of repudiation can be expressed in words or implied from the employer's actions. The employer in Polynova didn't say "we accept your resignation"; and its conduct, such as in keeping the machinist in its benefit plans, suggested just the opposite.

How to Smoke Out the Disappearing Employee

The moral of the story is that when employees go on medical leave, you can't just sit back and wait for them to contact you. Although you must give them time and space to heal, you must also take an active role in preparing for their return. That means maintaining contact and asking for regular updates so you can assess their medical situation, restrictions and the accommodations you might have to make.

Also be prepared if employees who are on medical leave vanish from the face of the earth. Keep making calls even if the employee doesn't pick up; keep leaving messages even if the employee doesn't return them. The employer in *Polynova* did all of these things. Its fatal mistake was in deciding to treat the machinist as having resigned without attempting to relay that crucial piece of information to him.

In other words, when you're out of patience in trying to contact an AWOL employee, you must shift gears into "acceptance of repudiation/resignation" mode. Specifically, notify the employee that you interpret his actions to constitute a resignation of his position and that you accept the resignation.

But before you do, you might want to give the employee one last chance to reconnect. "This simple approach works remarkably well," raves an Ontario employment lawyer. "The employee almost always responds and, in many cases, offers an acceptable explanation that resolves the misunderstanding or miscommunication that caused the situation."

The key is crafting the right message. While each situation is different, the HR Insider notice template hits the right buttons by, among other things:

- Citing the employee's duty to maintain contact while on leave;
- Documenting attempts to contact the employee;
- Listing a deadline for the employee to call and resume contact; and
- Indicating that failure to do so will be treated as the employee's intent to resign which you'll then accept.

If the employee doesn't respond, treat it as an abandonment of employment and initiate the paperwork of termination, including issuing the ROE listing Code E-Quit as the reason for termination in Block 16.