

NEWS&VIEWS JULY 2021

Employee verbal resignations: what are the risks?

Employment law is a minefield for employers. While there's plenty of material available about complex situations and law cases, sometimes employers just want to know the basics.

A classic example is the need to understand the issues when an employee resigns verbally. Most employers mistakenly believe that a resignation needs to be accepted, and they enter into discussions about it. Others may not understand the law in this area.

We regularly field questions such as:

- Should I accept the resignation?
- Should I wait to see what they do next?
- Can I make them stay?
- What should I do if they don't put it in writing?
- Do I have to allow them to work the notice period?
- When does their employment actually end?
- Are there any legal risks arising from the resignation, such as a claim for constructive dismissal?

This article provides the answers to the basic questions and highlights the legal risks that can arise in these situations.

What happens after the employee says "I quit"?

When an employee is **counselled, disciplined** or directed to do something they object to, it can become a source of tension between you the employer, and the employee. If the employee isn't open to the direction or feedback, the situation can escalate, resulting in the employee's verbal resignation. It's often referred to as a **heat of the moment** resignation.

At other times, an employee may indicate that they are going to resign. Or they may tell you they're resigning before returning to work as if nothing has happened. It's not surprising that employers in this situation are often unsure of what to do next and find themselves in need of guidance.

The general rule of thumb is that a resignation is immediate when given and the employment ends at the end of the valid notice period provided. Therefore, it doesn't need to be accepted. However, it's always better to get the resignation in writing. If that's not possible, you should write to the employee confirming that they have resigned and importantly, when their employment ends.

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It's also critical to consider the circumstances surrounding the resignation. It will help you to identify what steps to take to eliminate any legal risks. For example, the legal risks may be greater if you don't have proper documentation or you're experiencing uncertainty managing the situation.

Some, but not all, employment contracts require a resignation in writing. Ultimately, the employee's conduct is important. Even if a contract says the resignation may be in writing, a verbal resignation **may** be sufficient.

Why does the employee's conduct matter?

The employee's **message and intent must be clear**. Resigning under pressure or in the heat of the moment may be categorised as *special circumstances*. It means that you will need to **consider the employee's conduct before, during and after the resignation** before you can safely conclude that the employment relationship has ended.

The 2021 case of *Harvey*¹ concerned a casual worker who verbally resigned following a heated discussion with the employer about underpayment issues. He walked out of the meeting saying, "I will hand in my notice". He took a few days' sick leave and then returned to work.

Then he had another heated discussion with the employer. This time, he sent a text message to his manager indicating that he would resign the next day. But later, he sent another message saying that he had changed his mind and would work his next shift as usual. He did so, but four days later, the employer gave him a termination letter, saying that his resignation was "formally accepted."

The employee claimed unfair dismissal in the Fair Work Commission (FWC). The employer defended the claim, saying there was no dismissal because the employee had resigned.

The FWC found that the employee had not resigned, so the employer's termination letter was unfair. The key findings of the employee's conduct were:

1. The employee had indicated an intention to resign rather than a final decision. An intention couldn't be taken as a clear signal to the employer of the resignation
2. The employee went to work after indicating his intention to resign
3. The circumstances were highly charged due to the employee's belief that he was underpaid

The FWC also said that:

"[The employee] did not resign. He raised legitimate issues which needed to be resolved concerning ... a potential underpayment for the hours worked by him. Those issues were difficult, but they needed to be worked through in a careful manner. Rather than taking that course, [the employer] brought the employment relationship to a hasty end, without any prior notice to [the employee]."

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What should I do if my employee verbally resigns?

The *Harvey* case demonstrates that as an employer, you must pay careful attention to the employee's words and conduct before you either:

1. Take steps to confirm that a resignation has occurred; or
2. Terminate the employee

When faced with a verbal resignation, we suggest that you consider:

- Whether the resignation was **clear and definite**. If it wasn't, seek clarification
- Having someone else present as a **witness to the resignation**. They should make detailed notes of what was said, including time, date, and location. You should do the same as soon as possible after the resignation
- Asking the employee if they need time to consider their decision. If they do, send them a confirmation email. Don't leave things open-ended. Make sure you give a cut-off date for them to change their mind
- If the resignation is clear, sending them an email or letter to confirm that they have resigned. Make sure you specify:
 - The date of the resignation; and
 - Any relevant notice period; and
 - **Whether you require them to work the notice period**
- Getting legal advice before issuing any correspondence or finalising any paperwork

Can I make the employee stay?

No, you can't force an employee to work for you. If the employee has:

- Left on bad terms
- Doesn't want to be there
- Voiced a clear objection to your direction

why on earth would you try to get them to stay? It's always best to let them leave and then consider whether there is any legal basis to withhold payment for any or all of the notice period. You must seek legal advice on this point as not all awards cover this issue and generally speaking, the law prohibits deductions for the employer's benefit.

Am I required to let the employee work the notice period?

You're not required to allow the employee to work their notice period. However, let's consider this situation: an employee has given the proper notice under their contract or the relevant award, and you don't want them to work through the notice period. If that happens, you should write to the employee, making it clear that you will pay them for the notice period instead of having them work.

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When does the employment relationship end?

If an employee provides notice and works through to the last day, their employment ends when they last worked for you.

If an employee resigns, leaves immediately and refuses to work, their employment ends immediately regardless of any notice period in the award or contract.

If:

1. The employee provides notice; and
2. You release them from their obligation to work all or part of the notice period; and
3. You pay the balance of the notice period,

it's important to be clear that their employment has ended on the day they are released (if it's what you want to happen). This should be in writing.

However, it's essential to remember that you may have valid legal reasons for keeping the employee on the books during their notice period, particularly if there are non-solicitation or restraint provisions you want to enforce. It's best to get legal advice before taking action to ensure your interests are protected.

What about constructive dismissal?

Under the *Fair Work Act*, a constructive dismissal occurs when the employee resigns because they had no real choice. The employee must prove that:

- They did not voluntarily resign; and
- The employer forced the resignation; and
- The employer intended to end the employment relationship

Constructive dismissal is not always an easy claim to make. If the employee has not exhausted all options to resolve the dispute, they will have a difficult case to make before the FWC.

These heat of the moment resignations often arise when the employee is subject to disciplinary action. Rather than participate in the process, the employee may choose to resign.

The employee may send you a lengthy letter indicating that they feel bullied by the process, or unwell due to it. Or they may say how unfair they think it is that you have put allegations to them. When this happens, it's important that you write to the employee and make it clear that:

1. They're not being forced to resign; and
2. Participation in the process is a requirement to ensure a just outcome

In other words, you're checking with the employee that they're sure they want to resign and are not just acting in the heat of the moment. It's always best to seek legal advice if this happens.

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Summing up

As lawyers tend to say, *“each case will turn on its facts”*. Although it’s frustrating, it is the truth. It means that you must be aware of the issues and risks if you’re dealing with any resignation, but particularly a verbal resignation.

For many employers, it presents an opportunity to address an employee’s concern. But without adequate time, consideration, clarification and evidence, the legal risks are significant. It’s always cheaper and more efficient to be on the front foot and seek legal advice before finalising the relationship.

If your employee has verbally resigned and you are unsure what to do next, the best step is to seek our urgent legal advice.

¹*Rodney Harvey v Valentine Hydrotherapy Pools Inc* [2021] FWC 3373 (10 June 2021)

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