IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FALCON TOOL & DIE (1979) LIMITED
- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW - CANADA) and its LOCAL 195
- The Union

AND IN THE MATTER OF a grievance of Sonya Harris

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Jeanine Watt	- Counsel
Jacqueline Hillier	- Manager, Human Resources

On behalf of the Union:

Debbie Fields	- National Representative, CAW
Sonya Harris	- Grievor

Hearing held March 5, 1999 in Windsor, Ontario.

AWARD

I. INTRODUCTION

Sonya Harris, the grievor, alleged that she had been forced to "involuntarily quit" her employment. It was the Employer's position that the grievor had resigned.

II. THE EVIDENCE

The Employer operates a metal stamping business in Windsor, making parts for the auto industry. The grievor had been employed for nine years as a punch press operator.

The collective agreement provides for job rotation. The problems leading to the grievance began in February, 1998 when the grievor was assigned to the "shell" job on press #129. While the grievor had operated this press before, she had not used it for the shell job. When the grievor was assigned the shell job on this press she became agitated. She testified that she was sweating, crying, shaking, and that her stomach was "doing flips" and she left work early. In March, 1998 she was again assigned the shell job and had a similar experience. The grievor was unable to explain her reaction to this job. She testified that her reaction to this job was similar to her reaction to snakes.

In March 1998 the grievor was permitted to switch jobs with another employee but her supervisor indicated that if she wished to continue switching from the shell job she required a doctor's note. She thus obtained a note from her own physician, Dr. B. Lamont, and provided it to her supervisor. The text of the note was as follows:

> Has a PHOBIA regarding a particular job working with the "SHELL" and Press #129. Allow her to do other job.

From April, 1998 until January 13, 1999 the grievor was away from work for reasons not

related to this grievance. When the grievor returned to work January 13, 1999 she was again assigned the shell job. She advised her supervisor that she had previously obtained a note from her physician, that the note was in the office, and that she was not supposed to do the shell job. She was given another work assignment.

Later that day the grievor was called to the Human Resources office where she met with Jacqueline Hillier, the Employer's Human Resources Manager, in the presence of the Union Chairperson. Ms Hillier advised the grievor that the existing doctor's note was no longer sufficient and the Employer felt that a phobia was something for which the grievor required treatment and about which the grievor needed to see a psychiatrist. Ms Hillier told the grievor that the Employer would accommodate her until January 29. After that date she would have to work on the shell job unless she scheduled an appointment with a psychiatrist. The grievor informed Ms Hillier that she would quit before she saw a psychiatrist. After the grievor left the meeting, Ms Hillier discussed the issue with the Union Chairperson who expressed the opinion that there was nothing further the Employer should have done.

The grievor was upset after this meeting as she felt that it was unnecessary for her to see a psychiatrist. The grievor also believed that it was unfair that the doctor's note which had previously been sufficient to allow her to switch from the shell job was no longer acceptable. She continued to work for several days but remained upset, and she had several "crying spells" while at work. Although Ms Hillier would normally be advised of someone crying at work, she was not informed in this instance.

Early on January 19 the grievor's husband telephoned the Employer and indicated that the grievor would not be at work. Soon thereafter the grievor called Ms Hillier and asked for a meeting as she had something which she wanted to tell Ms Hillier. The grievor, accompanied by her husband (for moral support) and the Union Chairperson, met Ms Hillier

later that morning. Before the meeting began, Ms Hillier assumed the grievor would resign at the meeting. The grievor then told Ms Hillier that she was resigning. Ms Hillier asked her to put her resignation in writing and the grievor wrote and signed a letter of resignation. The grievor's letter of resignation indicated that ". . . I am quitting my employment . . . as of Jan. 19/99 because I feel unjust treatment regarding Press #129 & the shell job & that they want me to see a psychiatrist over one particular job."

During the January 19 meeting, Ms Hillier indicated that she understood the grievor's physician, Dr. Lamont, had previously advised the grievor that the grievor would have to see a psychiatrist if his note was insufficient. The grievor noticed additional writing on the Employer's copy of her doctor's note. As the grievor had not informed the Employer of Dr. Lamont's comment, she believed that the Employer had contacted Dr. Lamont for information regarding her medical condition without first obtaining her consent. She asked Ms Hillier for a copy of the note containing the handwriting. Ms Hillier responded that she would consult before she could provide a copy of the note. The grievor, her husband and the Union Chairperson moved to the Union office.

Ms Hillier did consult, then declined to provide a copy of the doctor's note with the additional writing. Instead she prepared a letter in which she confirmed the grievor's "voluntary resignation" and replied to the grievor's claim of unjust treatment. Ms Hillier gave that letter to the grievor before the grievor left the plant. The grievor, at her own suggestion, turned in her employee card and collected her safety shoes before leaving.

Initially the grievor was happy, but the following night (January 20) she said it "clicked in" that she had left her job. She then took steps to get her job back. She first contacted her own lawyer who wrote to the Employer on January 22 advising that he was initiating the grievance procedure. The grievor then met the Union and filed the grievance before me.

III. POSITION OF THE UNION

The Union submitted that the grievor had no intention of terminating her employment. The first time the grievor was assigned the shell job she had a strong emotional reaction and that response had continued. She had seen her doctor about this matter and he had advised that she do other work. The Union submitted that the grievor's January 13 statement to Ms Hillier that she would quit before seeing a psychiatrist was an emotional reaction to being assigned to work on the shell job. By January 19 the emotional pressure was so strong the grievor felt it necessary to resign. Her emotional upset influenced her thinking.

It was the Union's position that the following day, when the grievor realised what she had done, she promptly moved to correct the situation by contacting her lawyer and the Union and by pursuing this grievance. While the grievor had a strong emotional reaction to this one job, there were no concerns regarding her other work. In addition, if the grievor was removed from this job, her removal would present no difficulty for the other employees.

Given the history of the grievor and this job, the Union submitted that when the grievor was told that she had to see a psychiatrist or else do the shell job it was similar to putting "a gun to her head" and therefore the resignation was not voluntary. As it was not a voluntary resignation, I was asked to declare that the grievor remained an employee with no loss of seniority or benefits and to award her compensation beginning January 22, when the Employer first learned that the grievor wished to rescind her resignation.

Finally, I note that the Union and Employer agreed that if the grievor returned to work she would be required to seek additional medical assistance regarding her phobia.

The Union referred me to the following awards: *Re Foster Wheeler Ltd. and United*

Steelworkers, Local 6595 (1990), 14 L.A.C. (4th) 136 (Joyce); *Re Government of British Columbia and British Columbia Government Employees' Union (Sherwin)* (1990), 16 L.A.C. (4th) 229 (Bird); and *Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union* (1986), 27 L.A.C. (3d) 120 (Outhouse).

IV. POSITION OF THE EMPLOYER

The Employer acknowledged that the grievor had an emotional reaction to the shell job. The Employer had accommodated her regarding that job and had offered to continue to do so until January 29. However, if the grievor wished to remain off the shell job the Employer required her to obtain treatment for her phobia and expected her to seek the assistance of a specialist. The Employer noted the parties had agreed that the grievor would seek this treatment if she was reinstated.

It was clear that the grievor was unhappy about her situation in January. She indicated January 13 that she might resign. She scheduled a meeting with Ms Hillier January 19 and she attended with her husband and her Union Chairperson. The Employer said the grievor sought the meeting to resign and that she had then done so. There was no obligation upon the Employer to prevent the grievor, who clearly wished to resign, from accomplishing her wish.

The Employer submitted that the Union was required to demonstrate that the grievor was not capable of forming the intention to resign. But the evidence did not support such a conclusion. The evidence indicated that she had meant to resign and had resigned.

The Employer asked that I dismiss the grievance. If I reinstated the grievor, the Employer submitted that no compensation be paid prior to March 5, the date of the hearing, as that was the date the grievor accepted the necessity for medical treatment.

The Employer referred me to the following awards: *Re Wellesley Central Hospital and Service Employees International Union, Local 204* (1996), 61 L.A.C. (4th) 433 (Gray); and *Re Meadow Park Nursing Home and Service Employees Union, Local 210* (1993), 36 L.A.C. (4th) 283 (Brandt).

V. CONCLUSIONS

This grievance does not involve a specific provision of the collective agreement. The grievor was a member of the bargaining unit, but nothing in the collective agreement regulates the process by which an employee resigns. However, it is clear that an employee can resign her employment and, if she does so, the provisions of the collective agreement will no longer apply to her.

In this instance the question is: Did the grievor resign? If she did resign, the Employer is correct to treat her as a former employee, for nothing in this collective agreement allows the grievor to change her mind and unilaterally restore her employment. If the grievor did not resign, then she remains an employee covered by this agreement.

The grievor is not the first worker to have taken an action which his or her employer understood to be a resignation from employment but which the worker (or union) later submitted was not a valid resignation. Arbitrators have frequently been called upon to determine what constitutes a valid resignation from employment. In so doing, arbitrators have generally accepted that a valid resignation requires two elements - a subjective intention on the part of the employee to resign and objective conduct which confirms the employee's intention. Arbitrator Brandt accurately expressed the general view of arbitrators in *Re Meadow Park, supra,* as follows:

> The law in this area is quite clear. In order that an employee be found to have effectively resigned her employment it must be demonstrated not only that she had a "subjective

> intention" to resign but also that this intention be confirmed by some "objective conduct". The concern that underlies this doctrine is that resignations frequently are offered in the heat of the moment or at times of some personal stress and that they may not express the employee's real wishes. Consequently, arbitrators have looked at conduct over and above the expression of a desire to resign employment in order to satisfy themselves that the intention to resign is one which is continuing and real. . . [p. 285-6]

In this case the grievor first told Ms Hillier on January 13 that she was considering resigning. On January 19 she resigned orally. She then put her resignation in writing. These acts constitute adequate "objective conduct" to support a resignation.

The difference between the parties is whether the grievor had a "subjective intention" to resign. A resignation must be a voluntary and conscious act. If an employee did not *intend* to resign an arbitrator can intervene to protect the employee from an action which appears to be a resignation.

If a resignation is made under duress, that is if an employee is forced to resign - something the employee would not otherwise do - arbitrators have sometimes held that the employee did not voluntarily resign. For example, an arbitrator might decide that an employee who "resigned" when confronted with an employer ultimatum to "resign now or be fired" did not voluntarily resign.

Was the requirement to either seek medical treatment or do the shell job such extreme pressure that the resignation was not voluntary? I note that the Employer's directive was issued six days before the grievor resigned. The grievor had access to the Union through the presence of her Chairperson at both the January 13 and 19 meetings. The parties later agreed that if the grievor were to be reinstated she would seek appropriate medical treatment. Thus, while the grievor felt under pressure, I find that the Employer's requirement that she seek medical assistance for her phobia if she wished to remain off the shell job does not amount

to duress sufficient to invalidate her expressed intention to resign.

Duress is not the only matter which will invalidate a resignation. If an employee suffers from anxiety, depression or other illness, arbitrators have sometimes concluded that the employee was incapable of forming a voluntary intention to resign. This was the thrust of the Union's position in this case.

The Union noted that the grievor had an emotional reaction to the shell job. She had seen her doctor about her reaction and her doctor had advised she should do other work because of her phobia. When the grievor was then told that she was required to do the shell job unless she sought the assistance of a psychiatrist, the grievor again became upset. Although Ms Hillier heard nothing about it, I accept that the grievor was crying at work between January 13 and 19. I accept that the grievor was upset due to the Employer's January 13 directive that she either had to obtain treatment or perform the shell job.

Did the grievor's reaction to the Employer's directive make her incapable of forming an intention to resign? I note that two possibilities exist: either the grievor made an unwise decision which she later regretted and tried to reverse or, due to her distress, the grievor did not have the capacity to form an intention to resign. The first possibility would not assist the grievor; normally an employer is entitled to rely on the validity of a resignation and an employee has to live with the consequences of a decision to resign, even if that decision was unwise.

I must decide if the grievor had the capacity to form a true intention to resign. The evidence in support of the Union's position came largely from the grievor. Although she saw her doctor in March 1998 and he supplied the note quoted above, that note offers little assistance in resolving this issue.

On January 13, 1999 the grievor first indicated her intention to resign. After that meeting she was able to work several more days, although she was under stress and crying on occasion. She then sought and attended the meeting with the Employer's Human Resources Manager. The grievor told Ms Hillier she was resigning and then wrote her letter of resignation. She was accompanied by her husband and the Union Chairperson. Neither her husband nor the Union Chairperson testified and I heard nothing to suggest that the other participants in that meeting felt the grievor was unable to form a voluntary intention to resign. There was no evidence that the grievor was incapable of this, other than the evidence that she had a phobia regarding the shell job for which she did not wish to seek medical assistance. While I am sympathetic to the grievor's position I conclude that, notwithstanding her phobia, the grievor had the capacity to form an intention to resign.

As I have decided that the grievor both intended to resign and took adequate steps to put her intention into action, it follows that I find:

1. The grievor's resignation is valid; and,
2. The grievor is no longer an employee of the Employer.

The grievance is dismissed.

Dated at London, Ontario this 24th day of March, 1999.

Howard Snow, Arbitrator