Making Sense of the Confusion about Temporary Layoffs in Ontario

Ryan Edmonds and Justine Lindner

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Introduction

In unionized workplaces, temporary layoffs have long been an employer's most effective way of responding to economic downturns. For this reason, provisions concerning the right to temporarily layoff can be found in virtually every unionized employer's collective agreement.

But what about non-unionized employers? Many assume for a variety of reasons that the ability to temporarily layoff during times of economic hardship is an employer's inalienable right. While the law was firmly opposed to this for many years, courts have recently granted employers a little more flexibility on the issue.

The Traditional Approach

Traditionally, unless an employer can show that it has an implied or express contractual right to temporarily layoff, a court will find that the interruption to employment will constitute a constructive dismissal (the "traditional approach").[1] This is based on the view that an employer has no inherent right at common law to unilaterally suspend performance of the employment contract.

Because of this, even if the temporary layoff was due to economic hardship a finding of constructive dismissal will still trigger an employee's right to damages for reasonable notice. Depending on the employee's age, length of service, and position, these damages can range from a handful of months to a couple of years' worth of earnings.

What about the *Employment Standards Act, 2000*?

Muddying the waters in which the "traditional approach" resides is the fact that Ontario's *Employment Standards Act, 2000* ("*ESA*") not only addresses temporary layoffs, but even sets out when these layoffs do and do not constitute termination of employment.

For example, the *ESA* defines a "temporary layoff" as "a layoff not more than 13 weeks in any 20 consecutive weeks" or "a layoff of more than 13 weeks in any 20 consecutive weeks if the layoff is less than a total of 35 weeks in any period of 52 consecutive weeks". In addition to setting out various other requirements, the *ESA* goes on to state that termination of employment occurs if "[an] employer lays the employee off for a period longer than the period of a temporary layoff".

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[1] *Elsegood v. Cambridge Spring Service (2001) Ltd.,* 2011 ONCA 831.

Accordingly, it would appear that an employer has the right under the *ESA* to temporarily layoff an employee as long as the statutory requirements are met. Contrary to what one might expect, this has only recently begun to gain traction..

The Right to Temporarily Layoff: Which Prevails, Common Law or Statute?

The confusion about whether an employer has a unilateral right to impose temporary layoffs rests on two competing interpretations of the law.

Under the "traditional approach", courts view an employee's implied common law right to not be temporarily laid off as a "greater right or benefit" within the meaning of the *ESA*. This statutory provision provides that where an employment contract provides a "greater right or benefit" to an employee than the standards under the *ESA*, that right or benefit will prevail.[2]

More recently, however, the court in *Trites v. Renin*[3] accepted that the *ESA*, by virtue of its provisions about when a temporary layoff is and is not a termination, displaced the common law's position on this point (the "displacement approach"). Specifically, Justice Moore of the Ontario Superior Court stated:

> "In my view, there is no room remaining at law for a common law claim for a finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the *ESA*." [Emphasis added]

Under the "displacement approach", irrespective of any contractual authority, an employee will not be able to claim damages for reasonable notice of dismissal when an employer's temporary layoff complies with the requirements under the *ESA*. Notably, because the employee in *Trites* had not been laid off in accordance with the *ESA*, damages were still awarded for reasonable notice.

The Duty to Mitigate Still Applies

Despite this uncertainty in the law, any employer that does impose temporary layoffs should give employees an anticipated recall date, even if the precise date of recall is not yet known. This is because employees have a duty to mitigate any losses they may have suffered, and any unreasonable refusal to do so, which can include refusing recalls, may vitiate that employee's entitlement to damages.

For example, in *Chevalier v. Active Tire & Auto Centre*[4] an employer temporarily laid off an employee without having the proper contractual authority. However after realizing that the layoff may have triggered a constructive dismissal, the employer called the employee to apologize, admitted that it had made a mistake, and offered him back his position. The employee refused and maintained his claim of constructive dismissal.

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[2] *ESA*, s. 5(2).
[3] 2013 ONSC 2715.
[4] 2012 ONSC 4309.

The court found no "acrimonious or humiliating circumstances" which justified refusing the recall. As a result, the court held that the refusal constituted an unreasonable failure to mitigate, and as a result, no damages were awarded. This decision was recently upheld by the Ontario Court of Appeal.[5]

What Does this Uncertainty Mean for Employers?

As it stands, the state of the law on temporary layoffs vis-à-vis the "traditional approach" and the "displacement approach" is uncertain.

Given this uncertainty, employers who anticipate needing to temporarily layoff employees during an economic downturn should take certain steps to minimize the risk of constructive dismissal. These steps can include:

- Revising offer letters to set out the employer's right to temporarily layoff in accordance with the *ESA*;

- Giving advance notice of a company-wide change in policy regarding temporary layoffs and requiring signed acknowledgements from employees regarding same; and/or

- Revising an Employee Handbook to contemplate temporary layoffs under the *ESA*, provided the Handbook is referred to in company hiring documents.

If an employee still alleges constructive dismissal after being temporarily laid off, employers should consider following the *Chevalier* approach by recalling that employee back to work. Indeed, even if the common law attempts to protect employees by treating temporary layoffs as a constructive dismissal, that protection cannot be divorced from an employee's duty to mitigate his or her damages.

Ryan Edmonds is the owner of Ryan Edmonds Workplace Counsel, a boutique law firm that provides employment, human rights, and workplace investigation services to both employers and employees. Ryan can be reached at 647.361.8228 or Ryan@TorontoWorkplaceCounsel.com.

Justine Lindner is a recent graduate of Osgoode Hall Law School and a former articling student in Heenan Blaikie's Toronto office.

[5] *Chevalier v. Active Tire & Auto Centre Inc.*, 2013 ONCA 548.