The Only Good News Here Is For Lawyers – COVID Leave Triggers Constructive Dismissal

The Ontario Superior Court has ruled that an employer that implemented a layoff during the pandemic, which was "deemed" by the **Ontario, Employment Standards Act, 2000** (the "**ESA**") to be a statutorily protected infectious disease emergency leave of absence ("**IDEL**"), was nonetheless still a layoff for common law purposes that may trigger constructive dismissal.

Hundreds of employers were caught between a proverbial rock and a hard place during the last year: implement temporary layoffs or terminate significant numbers of employees, with associated termination costs that could scuttle a company fighting to stay afloat in a global pandemic. All levels of government provided some form of support and urged employers to keep people employed, or even to keep them on the rolls absent active work to perform. Indeed, the Canada Emergency Wage Subsidy program specifically provided that employers which kept inactive employees on payroll would not only receive CEWS but would also be able to claim back CPP and EI payments over the period.

There was an opportunity here in this case of first instance, for the Court to interpret the ESA in a more practical manner, so as to chart a course that would not embroil potentially hundreds of employees and employers in litigation. The narrow, technical interpretation applied in this case will likely increase the risk of litigation, damage companies still fighting for survival or trying to rebuild, and empower employees to decide whether to press their rights to reinstatement from IDEL through reprisal claims at the Ministry of Labour, or to assert constructive dismissal in civil court.

Layoffs and the ESA

Layoffs have always been a fraught legal issue in employment law generally in Ontario. The ESA provides expressly that employees who are laid off in excess of certain limits defined as "temporary layoffs" are deemed terminated. However, the ESA has never expressly authorized employers to implement layoffs in the first place. Thus, employers that have no explicit or implicit contractual right to lay off have often found that they violated employees' contractual rights and inadvertently constructively dismissed the employee by implementing even a clearly limited, temporary layoff.

The consequences of such a miss-step can be a financially painful lesson for the employer – as employees may "quit" and sue for constructive dismissal. Longer service employees whose contractual entitlements are not limited on termination to the ESA minimums, may be awarded significant pay in lieu of common law "reasonable notice" (subject to a duty to mitigate).

"Deemed" Statutory Leave

Unlike the ESA provisions which define the limits applicable to layoffs before they are deemed terminations – but critically do not expressly grant employers the contractual right to lay off – the IDEL provisions expressly deem a layoff initiated due to COVID-19 not to be a layoff at all, but rather a statutorily protected leave of absence.

In our respectful view, the Court in **Coutinho v. Ocular Health Centre Ltd**., focused too closely on section 8 of the ESA, which provides essentially that nothing in the ESA affects an employee's civil remedies (common law rights). In doing so, the Court found that, absent an express provision in the ESA which provided that the IDEL deeming provisions over-rode an employee's common law right not to be laid off temporarily, the common law right to continuous, active employment remained. Thus, an employer that does not have the contractual right to implement a layoff, still breaches an employee's contract by implementing a temporary layoff – even if that layoff is deemed for ESA purposes to be a statutory leave.

Looking Ahead

We flagged this unfortunate possibility in our update last May 2020, when IDEL was introduced. At the time, had the Ontario Government not introduced the IDEL, hundreds of employees, even those whose employers actually had the contractual right to implement layoffs temporarily, would still have reached the ESA's "temporary layoff" limits and their employment would have been terminated by statute. However, we cautioned that although there were valid interpretive and public policy arguments in favour of an alternate conclusion, that a Court may still rule per section 8 that common rights were unaffected and that a layoff implemented without contractual right – even one deemed to be IDEL – was still a constructive dismissal.

Employers faced with claims of constructive dismissal in relation to IDEL, should put employees' feet to the fire on mitigation. Unless the employer acted in bad faith or targeted an employee, employees who were laid off with their co-workers due to bona fide financial and operational realities during the past year, employees who are constructively dismissed, may be required to accept a recall (and may sue only for lost wages), as a way of mitigating reasonable notice losses.

This was just the first decision on the issue. It is possible that other courts will find otherwise at first instance or on appeals. However, if this interpretation were upheld in future decisions, one thing is for certain – the only good news here is for lawyers.

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