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Can the Pandemic Teach Old Law New Tricks?

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Temporary Layoffs, Constructive Dismissal and Statutory Intervention in the time of COVID-19[1]

COVID-19 has changed the face of Canadian society. So, it is to be expected that the pandemic will also leave its mark on employment law. The word "unprecedented" has been used to describe recent events to the point where it now almost seems cliché. That said, legally speaking, we truly are without precedent as to how traditional employment law principles are to operate in the context of a major, prolonged, public health crisis.

The last significant pandemic to hit Canada was the Spanish Flu in 1918, which resulted in 50,000 lost lives. Most of modern Canadian employment law, however, developed only in the century following this event. For instance, one of the oldest, and yet still frequently cited employment law cases - *Bardal v. Globe & Mail Ltd.*[2] – was decided in 1960, almost 40 years post-Spanish Flu.

Accordingly, as the COVID-19 pandemic hit, employment lawyers have been left with the unenviable task of trying to guess at how courts will react. All litigators know just how much specific facts can drive legal outcomes. Thus, one of the most pressing questions facing the employment law bar is how traditional legal doctrines will be adapted (or not) in the era of COVID-19.

This paper will briefly address one tool many employers have turned to during the pandemic: temporary layoffs. These have become a major point of contention, focused on the question of whether existing precedent should govern or whether the pandemic has resulted in the need to expand the common law. It is a high stakes fight. An impermissible layoff may end in a finding of constructive dismissal, the result being an employer is required to pay severance at the exact time it is trying to save costs by temporarily reducing the size of its payroll.

The Current Law of Temporary Layoffs

> *At common law, an employer has no right to lay off an employee. Absent an agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and would be a constructive dismissal.*[3]

As COVID-19 began to take hold in March 2020, the first wave of mass layoffs took place across the country. Yet many employers were also then faced with an awkward realization. Employers are generally barred at common law from unilaterally imposing a temporary layoff on staff (absent their agreement to the same). This came as an unwelcome surprise to many, given that the *Employment Standards Act, 2000* ("**ESA**") contains a specific allowance for temporary layoffs (at s. 56(2)).

While some employers had the foresight to build in specific clauses to their employment contracts allowing for temporary layoffs, to date, the use of such provisions has not been widespread.

Pre-pandemic, most Ontario courts have ruled the same way when asked to reconcile the common law bar on temporary layoffs with the ESA's allowance (subject to certain restrictions). As explained by Justice Morgan in the 2016 decision of *Bevilacqua v Gracious Living Corporation*:

> *An employer has no right to impose a layoff either by statute or common law, unless that right is specifically agreed upon in the contract of employment. The fact that a layoff may be conducted in*

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[2] (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

[3] *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 14. See also: *Stolze v. Addario*, 1997 CanLII 764 (ON CA).

> *accordance with the Employment Standards Act, 2000, SO 2000, c. 41, is irrelevant to the question of whether it is a constructive dismissal.*[4]

The rationale for this position is rooted in ss. 5(2) (greater right or benefit) and 8(1) (civil remedies) of the ESA. These two statutory provisions make clear that the ESA does not displace greater contractual or common law rights and protections.

There was a brief judicial attempt made in 2013 to argue that the ESA had overtaken the common law with respect to the permissibility of temporary layoffs. In the case of *Trites v. Renin Corp*, Justice Moore wrote (albeit in *obiter*):

> *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.*[5]

Justice Moore's call to action, however, seems to have fallen on deaf ears. Subsequent decisions of both the Superior Court of Justice[6] and Court of Appeal[7] have instead repeated, and endorsed, the common law's traditional bar on non-contracted temporary layoffs.

Such was the state of the law entering 2020. Then the pandemic hit. In the course of March to May alone, Ontario lost over 1 million jobs. In some sectors, entire workforces were placed on temporary layoff as employers desperately waited for the worst of COVID-19 to pass.

Given the speed at which the pandemic hit, and the necessity for quick action, many employers paid little attention to the dictates of the common law, and whether workers had previously signed contracts permitting layoffs. That set the stage for what may become a flood of future litigation.

Questions Left Unanswered

Pursuant to the traditional interpretation of the common law, there may have been hundreds of thousands of potential cases of constructive dismissal resulting from employer layoffs during the pandemic. None have yet been litigated to completion. But when these cases do come before the courts, we can expect that the following questions may well arise:

1. *Is it time for Ontario courts to revisit Justice Moore's suggestion that the ESA has overtaken the common law concerning the permissibility of temporary layoffs?*

   We anticipate Justice Moore's recommendation will be brought forth again by employers seeking to defend against claims of constructive dismissal due to pandemic-driven layoffs. With current events providing a more pressing public policy rationale than in years past, it is possible that the courts may rethink past objections and be more receptive to the notion of simply incorporating statutory layoff rights into the common law.

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[4] 2016 ONSC 4127 at para. 9 ("*Bevilacqua*").

[5] 2013 ONSC 2715 at para. 29. See also *Vrana v. Procor Ltd.*, 2003 ABQB 98 ("*Varna*") (aff'd on different grounds 2004 ABCA 126) where a similar argument to that employed by Justice Moore was accepted in Alberta. *Varna* was latter challenged by the more recent decision in *Turner v. Uniglobe Custom Travel Ltd.*, 2005 ABQB 513.

[6] See *Bevilacqua*, *Michalski v Cima Canada Inc.*, 2016 ONSC 1925 ("*Cima*") and *Gent v. Strone Inc.*, 2019 ONSC 155. The *Cima* decision is particularly noteworthy, as within Justice James specifically rejects Justice Moore's approach, writing at para. 23: "*It appears to me that the Trites decision is out of step with the weight of the prior authorities previously referred to. To the extent that the decision of Moore J. in Trites stands for the proposition that the common law conditions precedent to a lawful layoff have been completely displaced by the ESA, I respectfully disagree.*"

[7] *Motion Industries (Canada) Inc. v. McCarthy*, 2015 ONCA 224.

2. *What will be the impact of deemed Infectious Disease Emergency Leave ("**IDEL**") on the analysis of whether pandemic-driven temporary layoffs amount to constructive dismissal?*

   On May 29, 2020, the Ontario Government released *O. Reg. 228/20,* made pursuant to the ESA. This short regulation had a mammoth impact on employment law. *O. Reg. 228/20* operates, with retroactive effect to March 1, 2020, to deem any worker originally put on temporary layoff (due to the pandemic) to, instead, have been on placed on unpaid IDEL.

   IDEL has the advantage of allowing employers to keep workers off without pay for far longer than an ordinary temporary layoff. For instance, temporary layoffs pursuant to the ESA may only last to a maximum of 13 weeks within any 20-week period (unless special circumstances apply). By contrast, deemed IDEL can last as long as permitted by the Ontario Government.

   Originally, deemed IDEL was intended to operate only for a maximum period of 27 weeks. However, Ontario extended the permissible length of deemed IDEL to a 44-week period as of September 3, 2020 (via *O. Reg. 492/20*). Ontario may again expand the length of deemed IDEL in the coming months, as the current expiry date is January 2, 2021, a time by which few expect COVID-19 to have been vanquished.

   It remains to be seen how the courts will address the impact of IDEL on claims for constructive dismissal. IDEL may prove to be a tool by which to resolve such cases very quickly. This could occur by distinguishing situations that qualify as IDEL from those of ordinary temporary layoffs. After all, if the employer action at issue is no longer considered to be a temporary layoff due to statutory intervention, it may be inappropriate to apply existing layoff jurisprudence. This type of approach would also neatly avoid the courts having to alter existing common law interpretation. That said, deemed IDEL, being an unpaid forced leave, could very easily be argued to be just another form of temporary layoff by a new name.

3. *Will the courts recognize a new implied contractual right for employers to temporarily layoff employees due to the pandemic?*

   Such a development would not be entirely without precedent. Ontario courts have long acknowledged an implied layoff right may exist in select situations. Examples include where temporary layoffs are common in an industry[8] and cases where employees are aware their work is cyclical in nature and subject to occasional stoppage.[9]

   When assessing a potential implied right to layoff workers, courts ask whether the employer's authority to act in this regard is "notorious, even obvious, from the facts of a particular situation."[10] That is the test employers must now meet in the context of the pandemic. In other words, how obvious is it that employers require layoff rights to deal with COVID-19?

   A myriad of factors will come to bear on this analysis. For instance, if an employer has staff on written contracts but (for whatever reason) elected not to include a layoff clause, should

[8] *Janice Wiens v. Davert Tools Inc.*, 2014 CanLII 47234 (ON SCSM).
[9] *Hefkey v. Blanchfield*, 2020 ONSC 2438.
[10] *Michalski v. Cima Canada Inc.*, 2016 ONSC 1925 at para. 22.

the courts now intervene to provide such a right? Does the existence of IDEL remove any need to recognize a new implied right to layoff workers due to the pandemic? Finally, what will be the impact of government supports (like the Canada Emergency Wage Subsidy) on an assessment of how vital layoff rights will be as a tool to manage the pandemic for employers facing financial hardship?

4. *Will employers be rescued by the Potter test for constructive dismissal?*

   Even absent a contractual or implied right to initiate a temporary layoff, employers will only be exposed to liability if a court deems the change to amount to a constructive dismissal. And such a finding is not a given in the context of a public health crisis. At its core, constructive dismissal requires a court to conclude an employer-initiated unilateral change amounts to an **unreasonable** alteration of the original terms of the employment relationship.

   The current test for constructive dismissal was established by the 2015 Supreme Court of Canada decision in *Potter v. New Brunswick Legal Aid Services Commission*.[11] It has two branches: one deals with a single fundamental change to the employment relationship (e.g. a 50% wage cut) and the second addresses series of acts that, when taken collectively, amount to a repudiation of contract (e.g. the creation of a toxic work environment).

   Temporary layoffs engage the first branch of the *Potter* test. Within this branch, the critical question for the courts to consider will be whether, in the context of a global pandemic, a "***reasonable person in the same situation as the employee*** *would have felt that the essential terms of the employment contract were being substantially changed*" by the imposition of a temporary layoff.[12]

   This brings us back to the old debate about what is "reasonable" in the circumstances. It is possible that the courts may conclude that a temporary layoff driven by a major public health crisis creates a unique scenario in which the average employee would think it reasonable to endure some sort of temporary loss of work.

   That said, *Potter* also makes clear that the analysis of whether any unilateral change will be considered reasonable is a "*highly fact driven exercise*."[13] Indeed, "*one cannot generalize*" which specific scenarios will, or will not, amount to a constructive dismissal.[14] Extrapolating from this guidance, it may be possible that the courts will find temporary layoffs due to the pandemic permissible for some employers (such as those affected by a shutdown order) and not for others (such as those whose operations have only been marginally affected).

Conclusion

There is always a time lag between when events occur and when courts rule on their legality. This delay has only been exacerbated by the temporary closure of most Ontario courts early in the pandemic. Whether employer rights to temporary layoffs are to be expanded or held in place will be determined in the coming months. In so doing, judges will have to grapple with many of the questions outlined in this paper. And yet, there is at least a somewhat pleasing symmetry to this sequence of events; after all, slow change based on novel situations is at the heart of the common law itself.

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[11] 2015 SCC 10 ("*Potter*").
[12] *Ibid,* at para. 39.
[13] *Ibid,* at para. 40.
[14] *Ibid*.