

Layoffs may come with hidden liabilities

BY IAN HARVEY
For Law Times

Common wisdom has it that the construction sector is not covered by all the niceties of the Ontario Employment Standards Act and that when handing out the pink slips, no severance packages are required.

Well, common wisdom would be wrong in some cases, says Erin Kuzz at Sherrard Kuzz LLP, specializing in construction law.

"It's true that they're not covered by ESA in that the construction is exempt from payment in lieu of notice," says Kuzz. "But there is some common law on this."

Most clients are surprised to discover they could be liable if the terminated

worker decides to make a case. "The employer might think, 'Oh, they can't afford a lawyer,'" she says. "But a lot of lawyers will work on contingency. If they know this area of the law and the employee has been employed for 10 or 15 years or more with no issues, then they might just take it on."

On the skilled trades front of the construction business, layoffs are a fact of life. The job finishes, or at least that trade's role on the site wraps up, work dries up as it has in this recession, or the season nature of the industry means December to March are down periods.

Most skilled workers have adapted to the on-again-off-again nature of the business, though up until the credit crash, most building sites were going full throttle and the biggest challenge facing contractors was not terminating staff but finding enough skilled staff.

In tough times, however, layoffs loom and core employees such as site superintendants and project managers may find themselves getting the axe. And that's when things change, she says.

It's a tough choice for company owners and senior managers, says Kuzz, because losing that talent also means losing a knowledge base and the loss of valuable assets since when things do turn around those people may have moved on.

The key, she says, is to have them leave on good terms.

"That means you may want to think about offering some severance even though you may not think legally you have to," she says. "And then, if they accept, have them sign a release."

It's not a strategy that immediately sits well with the hard scrabble contractor veterans who have been used to doing business their way for decades.

But ensuring the laid off employee is sympathetic and compensated may mean they're more likely to come back to work when things do pick up,

even if they've found another position elsewhere.

The common law is quite clear on general employees, says Kuzz, pointing to *Bardal v. The Globe and Mail Ltd.* which set payment in lieu of notice at a year's salary following 17 years of service. The tone for construction workers was set in *Scapillati v. A. Potvin Construction Ltd.* in which a carpenter claimed he was due severance in lieu because instead of

a temporary season layoff in Dec. 1993, he was not recalled in the spring, in effect a permanent termination.

The court held that Albino Scapillati, the plaintiff, had a long history of such layoffs and that it formed part of a pattern of employment. It also held that he'd only been working for Potvin

Construction since the previous spring despite a long relationship with the industry and the principals in the company and having worked for them before.

In dismissing the appeal and upholding the original decision that Scapillati was not entitled to payment, the court also set the bar high for any construction worker seeking compensation as the result of a termination, temporary or otherwise, says Kuzz, but importantly did not slam the door on the concept of severance.

But, she says, those workers with no or little history of cyclical layoffs and with a long employment history could be entitled to severance.

"It's very hard however to say how much," she says. "As always it depends on the age, the length of service, their skills, and the likelihood of future employment and how long it would take to find a similar position with similar compensation."

Sweetening the severance papers with a modest offer of severance is a proactive stance that could pay off later, she says, but not all clients are happy about it.

"I also recommend to them that they have a standard employ-

ment contract that recognizes the ESA," says Kuzz. "But clients in the construction industry are reluctant to formalize things and don't want to have a formal employment contract even though the one purpose is to protect the employer," she says. **LI**



Erin Kuzz