CANADIAN
Employment Law Today

PUBLISHED BY CANADIAN HR REPORTER www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS OCTOBER 16, 2013

Good news on layoffs for Ontario employers

Temporary layoff provisions not necessary in contracts, but employment standards must be met

BY LISA BOLTON AND CAROL CHAN

A RECENT Ontario Superior Court of Justice decision brings much needed clarity to employers seeking to utilize the temporary layoff provisions under section 56 of Ontario's Employment Standards Act, 2000 (ESA).

Historically, this statutory right was of limited use because courts had held that a temporary layoff under the ESA cannot be implemented unless an employment agreement between the employer and employee contemplates the right to layoff. Without this express provision, a layoff would be a constructive dismissal.

Trites v. Renin Corp. signals a welcome change for employers. It allows greater flexibility for an employer to lay off an employee to help manage its workforce and respond to temporary financial changes.

Sandra Trites was employed by Renin Corp. as a financial controller. In addition to regular wages, she was entitled to participate in Renin's group medical, dental and long-term disability benefit plans. She did not have a written employment contract with Renin.

As a result of financial difficulties, Renin instituted a number of cost cutting measures including temporarily laying off employees under the ESA.

EMPLOYMENT STANDARDS

Temporary layoff provisions

Section 56(1) of the ESA allows an employer to temporarily lay off an employee if the layoff is for not more than 13 weeks in any period of 20 consecutive weeks. If the layoff is more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks in any period of 52 consecutive weeks, the layoff will still be considered temporary if one of the following apply:

- The employee continues to receive substantial payments from the employer. (The meaning of "substantial" in this section has not been interpreted by the courts. The ESA Policy and Interpretation Manual states only that the payments must be "significant or substantial".)
- The employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan.
- The employee receives supplementary unemployment benefits.
- The employee is employed elsewhere during the layoff and would be entitled to receive supplementary unemployment benefits if that were not so.
- The employer recalls the employee within the time approved by the Director of Employment Standards.
- In the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

If none of these conditions are met, the ESA provides that the layoff automatically results in a termination of the employment relationship.

With this in mind, Renin instituted

Continued on page 6

In This Issue

Employee gets kick in the teeth for emergency dental appointment

AN EMPLOYEE was fired after she left work without notice for an emergency dental appointment — but an arbitrator has reversed that decision, saying she was well within her rights.

Erlinda Bernaldez was a full-time housekeeper employed at Glynwood Retirement Residence in Thornhill, Ont. She had more than 20 years' service when she was fired on May 22, 2012, as well as a three-day suspension on Bernaldez's record that pre-dated union certification.

On April 3, 2012, Bernaldez broke a crown off a tooth while at work.

According to the arbitrator's decision, Bernaldez's dentist was gone for the day by the end of her shift, so she booked the earliest emergency dental appointment she could get, which was at 3 p.m. the next day.

Despite the fact she was scheduled to work the 8 a.m. to 4 p.m. shift, she left work shortly after 2 p.m. in order

Continued on page 7

ESA allowed for temporary layoffs regardless of contract

...continued from page 1

rolling layoffs. By tracking the timing of each layoff, Renin sought to avoid a deemed termination by recalling employees within the statutory time limits.

Layoff was constructive dismissal: Employee

Trites was laid off in November 2011. When she was advised in January 2012 that she would not be recalled until July 2012, she found new employment and sued Renin for constructive dismissal.

In support of her claim, Trites relied on *Martellacci v. CFC/INX* for the proposition that a temporary layoff under the ESA cannot be affected unless the employment agreement contemplates the right to layoff. In this case, as there was no written contract governing her employment, Trites asserted Renin had no right to unilaterally lay her off.

The court rejected Trites' argument, finding the temporary layoff provisions in the ESA applied regardless whether there was an express or implied contractual right to lay off an employee, provided the employer complied with the statutory requirements for a temporary layoff under the ESA.

In this case, however, the court found Renin's layoff did not comply with the requirements in the ESA because, during the layoff, Trites neither continued to receive substantial payments or supplementary unemployment benefits, nor did Renin continue to provide ongoing entitlement to medical or dental benefits. As a result, the court found Trites had been constructively dismissed from her employment.

Lessons for employers

This decision is good news for employers, but with a caveat. On the one hand, the decision opens up new opportunities to implement temporary layoffs to respond to financial hardship. On the other hand, employers must continue to ensure the layoff is made in compliance with the ESA.

To minimize the risk of a constructive dismissal resulting from a temporary layoff, employers should consider the following best practice suggestions:

•Expressly provide for layoffs in employment contracts and employee policies because, although *Trites v. Renin* signals a new direction in the law, it is much easier and safer to include this as a term of employment from the start of the employment relationship.

•Ensure the time restrictions for a temporary layoff set out in the ESA are met.

•Ensure the ESA's criteria for a 35-week temporary layoff are met by:

•providing employees substantial payments, benefits, or supplementary unemployment benefits during the layoff period

•notifying employees of payments or benefits to be made during the layoff

•recalling employees within the time period set out in the ESA or any applicable collective agreement.

For more information see:

■*Trites v. Renin Corp.*, 2013 CarswellOnt 5634 (Ont. S.C.J.).

■*Martellacci v. CFC/INX*, 1997 CarswellOnt 885 (Ont. Gen. Div.).

ABOUT THE AUTHORS

Lisa Bolton
Carol Chan

Lisa Bolton and Carol Chan are lawyers with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Lisa and Carol can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 hour), or by visiting www.sherrardkuzz.com.

Employee induced minority owner to sign: Employer

...continued from page 3

Bychowski didn't have a signed employment contract with the severance provision they were enforcing, since Lovely had rejected it when it was presented to him. In fact, they admitted they were "embarrassed" to discover they didn't. The court determined Lovely never agreed to the new termination provision, either orally or in writing, and therefore it was "unlawful and unenforceable." In addition, the lack of any notice of severance for what was essentially a two-year term of employment was contrary to employment standards minimums, which made the provision in the termination letter void, said the court.

The court also found Lovely had proceeded as if he believed the original contract he drafted was in effect – calling himself president of Prestige, among other things – and none of the company's ownership did anything to contest it, which would have been expected had they believed the other contract was in effect. The company also tried to argue Lovely had induced the minority owner to sign his original contract and job description by saying it was only for his work permit, but the court didn't find this likely, as Lovely's representations were true – he intended it to be the employment contract and he needed it to secure work permit approval.

The court found the March 20, 2008, contract was in effect and McDonald & Bychowski were "obliged to discharge the promise they made" in that contract. This involved paying Lovely one year's base salary upon termination – the year remaining on the contract – totaling $76,425. See *Lovely v. Prestige Travel Ltd.*, 2013 CarswellAlta 1575 (Alta. Q.B.).