

Good News for Employers: Temporary Layoffs Just Got Easier!

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A recent Ontario Superior Court of Justice decision, *Trites v. Renin Corp.*, 2013 ONSC 2715, 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 a temporary layoff under the *ESA* cannot be effected unless an employment agreement between the employ-ee and employee contemplates the right to layoff. Absent 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 layoff an employee to help manage its workforce and respond to temporary financial changes.

Facts

Sandra Trites ("Trites") was employed by Renin Corp. ("Renin") as a financial controller. In addition to 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*.

Section 56(1) of the *ESA* allows an employer to temporarily layoff 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 preconditions are met, the *ESA* provides that the layoff automatically results in a termination of the employment relationship.

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

The Dispute

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*, [1977] CanLii12327 (Ont. S.C.J.) 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's Decision

The court rejected Trites' argument, holding that the temporary layoff provisions in the *ESA* applied regardless whether there was an express or implied contractual right to layoff 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 from Renin substantial payments and/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 and,
 - recalling employees within the time period set out in the *ESA* or any applicable collective agreement.

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