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EDITOR: TERRANCE S. CARTER

COURT LIMITS TEMPORARY LAY-OFF RIGHTS

By Barry W. Kwasniewski *

A. INTRODUCTION

On March 18, 2016, the Ontario Superior Court of Justice released its decision on a motion for summary judgment in the case of *Chea v CIMA Canada Inc*.[1] The case involved a dispute between Leang Chea (the "Plaintiff") and CIMA Canada Inc. (the "Defendant"). The dispute arose when the Plaintiff, who had been a draftsman for twenty-two years with the Defendant, was laid off. Of particular interest in this case was the treatment of the temporary lay-off and the relevant provisions of the Ontario *Employment Standards Act, 2000* ("ESA") by the Court. This Bulletin discusses the Court's analysis of the temporary lay-off in dispute and the impact that this decision may have on organizations that attempt to utilize the temporary lay-off provisions of the ESA, including charities and not-for-profits.

B. FACTS

In 1991, the Plaintiff was hired by Fox Engineering, which merged with CIMA Canada Inc. in 2011. From the date of hire in 1991 until January 2013, the Plaintiff remained continuously employed. Then, in January 2013, the Plaintiff was temporarily laid off from his position of lead engineering technician, also known as a mechanical designer. At the time of the lay-off, the Plaintiff was compensated at a rate of $63,797 per year plus benefits. About twenty days after being laid off, the Plaintiff managed to secure alternate employment for higher wages. Approximately six months later, the Defendant recalled the Plaintiff, but he declined to accept the recall.

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office. The author would like to thank Shawn Leclerc, B.A., J.D., for his assistance in preparing this Bulletin.
[1] 2016 ONSC 1937, [2016] OJ No. 1983.

C. DISCUSSION

The most interesting aspect of this case concerns the nature of the temporary lay-off, and the Court's analysis of it in light of the facts. The position of the Plaintiff was that the Defendant had to have a contractual right to invoke a temporary lay-off, notwithstanding sections 56(1) and (2) of the ESA (discussed below). Since there was nothing expressed or implied in the terms of his contract, it was the Plaintiff's position that the Defendant could not invoke a temporary lay-off, and that by doing so the Defendant's actions resulted in constructive dismissal.

The position of the Defendant, citing the Ontario Superior Court decision in *Trites v Renin Corp.* ("*Trites*"),[2] was that when a temporary lay-off complies with the requirements of the ESA, it cannot result in a constructive dismissal. Moreover, the Defendant argued that there was an implied term in the employment contract that permitted the Defendant to invoke a temporary lay-off, and that the Plaintiff should have known that temporary lay-offs were a possibility since three other workers in the office where the Plaintiff was working were also laid off the year before, and because of the nature of the consulting industry, which is subject to variations in business.

1. Temporary Lay-off under the ESA

While not specifically defined in the ESA, a lay-off is generally considered to be "an interruption of employment due to a lack of work, which may be caused by simple economic circumstances, such as a loss of business, or from a technological innovation implemented by the employer to make the business more efficient."[3] Under the ESA, paragraph 56(1)(c) provides that an employee is considered to be terminated if the employee has been laid off for a period that is longer than a temporary lay-off. Subsection 56(2), the section of the ESA dealing with temporary lay-offs, sets out the terms of a temporary lay-off as follows:

> (2) For the purpose of clause (1)(c), a temporary layoff is
>
> (a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
> (b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,

[2] 2013 ONSC 2715 (CanLII), online: <http://canlii.ca/t/fxc77>.
[3] T. Stephen Lavendar, *The 2016 Annotated Ontario Employment Standards Act*, (Toronto: Carswell, 2015) at 593.

(i) the employee continues to receive substantial payments from the employer,
(ii) 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,
(iii) the employee receives supplementary unemployment benefits,
(iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
(v) the employer recalls the employee within the time approved by the Director, or
(vi) 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; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

2. Court's Analysis

Having considered the arguments, the Court agreed with the position of the Plaintiff that in order for an employer to invoke a temporary lay-off there must be terms in the contract, either expressed or implied, that permit the employer to invoke a right of unpaid lay-off. Furthermore, even if the terms are implied, the Court stated that "[t]he right to impose a layoff as an implied term must be notorious, even obvious, from the facts of a particular situation." As a result, the Court rejected the Defendant's argument that the Plaintiff should have known that a temporary lay-off was a possibility stating that "the mere fact that a co-worker had been previously laid off does not create a legal basis for the defendant to impose layoff on the plaintiff." The Court stated further, "it is difficult to see how the layoff of one worker can result in a unilateral amendment of the employment contracts of other workers."

In accepting the position of the Plaintiff, the Court also rejected the argument of the Defendant that *Trites* stood for the proposition that the ESA had displaced the common law condition precedent to a lawful lay-off. Instead, the Court followed the Ontario Court of Appeal decision in *Stolze v Addario et al*,[4] which held that where a lay-off has occurred in the absence of a policy or practice of laying off key employees, that layoff is a "repudiation of a fundamental term" of an employment contract, and results in a constructive dismissal.

As a result, the Court held that the temporary lay-off was invalid in the absence of the necessary implied or explicit terms of the employment contract, and resulted in a constructive dismissal of the

[4] 1997 CanLII 764 (ONCA), online: <http://canlii.ca/t/6hl6>.

Plaintiff. In light of the foregoing, the Court awarded the Plaintiff his entitlement to the statutory payments under the ESA of 8 weeks' pay in lieu of notice and 22 weeks' severance pay, which amounted to $36,703.00, plus interest. In addition, the Court found that the Plaintiff was entitled to notice and damages at common law. However, because the Plaintiff secured alternate employment at increased wages shortly after being laid off, the Court found that any entitlements to damages based on reasonable notice at common law had been mitigated by the new employment.

D. CONCLUSION

This case sends a clear message to employers that careful consideration must be taken in drafting employment contracts that protect employers from potential liability. For charities and not-for-profits which, as a result of economic reasons, wish to utilize the temporary lay-off provisions of the ESA, this decision makes it clear that unless there are express terms in an employment contract for temporary lay-off, an employer may be exposed to statutory and/or common law liabilities. As the Court noted, citing *Employment Law in Canada*,[5]

> the traditionally-accepted view is that there is no standard implied term in the employment contract permitting an employer to lay off or suspend an employee from work without pay (page 11-56)... The common law does not recognize the concepts of economic layoff, disciplinary suspension or lockout in their own right... Thus, there is no principle of employment law that allows an employer to impose layoffs, disciplinary suspensions or lockouts (page 18-17).

While the facts of this case rendered the common law entitlement to notice and damages nil, had the facts been different, the Defendant may have been exposed to even costlier liability.

In light of the results of this case, charities and not-for-profits should take extra care in ensuring that they have employment contracts that make provision for temporary lay-off if they want to avoid exposure to liability for both statutory and common law liabilities in the event that a layoff is necessary.

[5] Peter Barnacle et al., *Employment Law in Canada*, 4th ed., (Markham: Lexis Nexis Canada Inc., 2005).

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