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When Can You Safely Reduce Your Payroll By Placing Redundant or Unwanted Employees on Unpaid 'Temporary' Layoff?

Alan Riddell and Kyle Van Schie

In the tough economic climate which has subsisted for the past few years, many Ontario employers have been tempted to resort to the stratagem of unpaid temporary layoffs, in the hope of temporarily reducing their annual payroll and permanently ridding themselves of certain unwanted employees, without the need to pay them statutory termination pay or Common Law pay-in-lieu of notice.

This is a highly risky strategy which employers should generally avoid, except in limited circumstances, and which even then should only be implemented with extreme caution. More often than not, the stratagem of placing unwanted employees on unpaid temporary layoff backfires by ultimately increasing the very payroll costs which the employer sought to reduce. This is so particularly where the unpaid layoff inadvertently contravenes either the Common Law or the specific temporary layoff provisions of the *Employment Standards Act*. Unfortunately, those latter statutory provisions have proven to be easily misinterpreted and misapplied, even in the hands of experienced HR managers and lawyers.

A plain but careful reading of subsection 56(2) of the *Ontario Employment Standards Act* deceptively suggests that all Ontario employers can unilaterally place their employees on unpaid temporary layoff for as long as 35 weeks in any given year, on condition that they maintain benefits coverage for those employees throughout that 35-week (8-month) layoff period. Based on the wording of this subsection of the *Act*, many employers naively assume that by issuing notices of unpaid temporary layoff to idle or unwanted employees, they can eliminate the cost of paying their salaries for as much as 8 months a year, simply by maintaining benefits coverage and abiding by the other, relatively innocuous, statutory parameters prescribed in that subsection. In many cases, employers also assume that many of the unpaid, laid-off employees will be "starved" into finding other jobs during the 8-month unpaid layoff period, and will never return when eventually recalled to work, thereby conveniently eliminating the need to ever formally terminate them, and to pay them any resulting statutory termination pay, severance pay or pay-in-lieu of notice.

Such assumptions are dangerously wrong, and mistaken reliance upon them can prove to be devastating to your company's bottom line.

In recent years, the Ontario Superior Court has repeatedly ruled that whenever an employer unwittingly breaks the law by placing an employee on unpaid temporary layoff, without his or her prior authorization for doing so, that employer commits a fundamental breach of the employment agreement, thereby triggering both a termination of employment and an automatic obligation to pay Common Law pay-in-lieu of notice and statutory termination pay.

In addition to these sums, the courts have also ordered the employer to pay the unpaid wages that would have been paid to the employees during the period of temporary layoff had the notices of layoff not been issued in the first place. The courts' rationale for ordering employers to pay these unpaid wages is that the withholding of pay during that layoff period contravened the employment agreement and was therefore illegal. This is what occurred in the Ontario Superior Court's seminal decision in *Pavlovic v. Nikolic*.

In some cases, the total damages which the employer must pay for its mistake, in both unpaid wages and pay-in-lieu of notice, can amount to many tens of thousands of dollars per individual affected employee. Where a number of employees have been placed on temporary layoff, in inadvertent contravention of the caselaw, the total cumulative cost to the employer can easily amount to hundreds of thousands of dollars.

Regrettably, the fact that the employer's misinterpretation of the law arose from a reasonable misreading of subsection 56(2), and from their understandable lack of familiarity with the Ontario courts' caselaw interpreting that particular, relatively obscure, subsection of the Act, is of absolutely no succour in containing the damage done. The old adage *'Ignorance of the law is no excuse'* has been applied to this exact situation, to prevent employers from rescinding the deleterious effect of their notices of layoff, after the gravity of their mistake was belatedly explained to them by specialized employment counsel.

Even in the rare case where a company's employment contract presciently contains a clause explicitly permitting the employer to layoff its employees, that clause will be null and void if it violates the statutory parameters expressly enumerated in subsection 56(2). In *Elsegood v. Cambridge Spring Service (2001) Ltd.* and other decisions, the Ontario courts have held that once these specific parameters for temporary layoffs are exceeded in any way, an employee is considered to have been constructively dismissed, and thereby automatically becomes entitled to statutory termination pay and Common Law pay-in-lieu of notice. More specifically, in the recent decision *Gauthier v. Beresford Box Company Inc.*, the Ontario Superior Court expressly ruled that *"if a temporary layoff [exceeds the ESA parameters] then the Act treats the layoff at that juncture as a termination of employment, and that*

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termination is a termination for all purposes, including the Common Law."

Many HR managers mistakenly assume that they can rectify their initial error, after it has been pointed out to them, by then hastily recalling the employees from the temporary layoff. Again, such is simply not so.• The Ontario Superior Court has ruled that where the temporary layoff does not conform, ab initio, to the specific statutory parameters set forth in subsection 56(2), any subsequent recall of the employees neither cures the original illegality of the layoff, nor undoes the employer's constructive dismissal of those employees.

The Court has stated that once the statutory parameters in Subsection 56(2) have been inadvertently breached in any way, the employment relationship is immediately and irrevocably severed, triggering an irreversible entitlement to termination pay and Common Law pay-in-lieu of notice to all the affected employees. To borrow from one proverbial expression, *'once the horse is out of the barn, it is too late to shut the barn door'*.

That said, there are some situations where it may be worthwhile to recall an employee from temporary layoff, even though that unpaid layoff has already triggered a termination of employment due to the employer's breach of the statutory parameters listed in subsection 56(2). One such situation is where the employee is a long-serving employee who is owed significant Common Law notice. In such circumstances, if the employee accepts the recall and returns to work, the employer may then successfully argue that the employee has acquiesced to the initial breach of his employment agreement and has irrevocably waived his right to claim pay-in-lieu of notice for constructive dismissal. In such a situation, the employer's financial liability to that employee will be significantly reduced, if not wholly eliminated.

Given the ostensible contradictions between the plain wording of the temporary layoff provisions of the ESA and the way in which those layoff provisions have been interpreted by the courts, employers should always proceed with extreme care and deliberation before issuing notices of temporary layoff to any of their employees. Any prudent employer who foresees even a remote possibility of eventually laying off a portion of its workforce at some future date should consult with an experienced employment lawyer to ensure that temporary layoff clauses are immediately added to the termination provisions in the employment contract with those employees. The language of such clauses must be clear and unambiguous, and must fully comply with both the ESA and the latest caselaw of the Ontario Superior Court.

Alan Riddell and Kyle Van Schie are Ottawa lawyers who specialize in labour and employment law and who work at the law firm of Soloway Wright LLP.