HISTORY MAY NOT REPEAT ITSELF: ONTARIO COURT OF APPEAL RESTRICTS ABILITY TO ENGAGE IN LAYOFFS

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The Ontario Court of Appeal recently held that an employer's past practice of laying off employees may not constitute an implied term permitting layoffs. In *Pham v Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, the employer laid off the employee in response to financial losses caused by the COVID-19 pandemic. In overturning the motion judge's decision that found the layoff was not a constructive dismissal, the Court of Appeal found that 1) the employer did not have an implied right to lay off the employee based on its past practice and 2) whether the appellant condoned the layoff was a live issue requiring a trial.

Facts

The employee began his employment with the employer in 2000. In March 2020, the employer advised the employee that, as a result of budgetary considerations and a slowdown, he would be temporarily laid off for a period of 13 weeks.

On June 2, 2020, the layoff was extended by the employer for a period of "up to 35 weeks". It was extended again on September 23, 2020, and again on December 9, 2020 until September 4, 2021.

The employee commenced a claim for constructive dismissal. In response, the employer brought a motion for summary judgement seeking dismissal of the action, arguing that it had an implied right to lay off the employee due to its past practice of laying off employees, which it last did in 2009, and that regardless, the employee condoned the layoff.

In granting summary judgement and dismissing the claim, the motion judge found there was no genuine issue requiring a trial because the appellant condoned the layoff.

Discussion

Implied Term Permitting Layoff

Absent an express or implied term in an employment agreement to the contrary, a unilateral layoff is a substantial change to an employment contract that constitutes constructive dismissal, even where the layoff is

temporary and even if permissible under employment standards legislation. The employee's terms of employment did not expressly permit the employer to lay him off, therefore, the Court of Appeal considered whether the employer demonstrated an implied term existed.

The Court of Appeal found that an employer's past layoff practices do not inherently establish an implied agreement. Rather, each situation must be analyzed on its facts. In this case, the Court of Appeal found that although the employer had previously laid off some of the employee's co-workers, the employee had not been laid off before and there was not an implied term.

Condonation of Layoff

An employee may condone a change to the terms and conditions of employment that would otherwise support a finding of constructive dismissal. To rely on this defence, an employer must demonstrate that, viewed objectively, the employer would believe at the time that the employee "consented freely to the change".

In concluding that the motion judge erred in finding no genuine issue requiring a trial regarding condonation, the Court of Appeal made the following findings:

1. The letter advising of the layoff did not constitute condonation because there was no evidence the employee's signature was anything more than an acknowledgement of the terms set by the employer for the layoff;
2. Although the employee contacted a lawyer in December 2020, this was not evidence of the knowledge of the ramifications of the layoff or consent to the layoff; and
3. The evidence did not demonstrate that the employee's failure to object to the layoff when he was not permitted to work for the employer constituted condonation.

Regarding the effect of the employee's silence in the face of the layoff, the Court noted the following:

1. An employee is permitted reasonable time to assess contractual changes before they are forced to take an irrevocable legal position;
2. Condonation in the face of a layoff is expressed by positive action, such that the employer would reasonably believe that the employee consented to the change;
3. An employee may be unable to condone the changes to their employment because they are not actively working during the period; and
4. There is no requirement for an employee to ask when they might be called back to work before commencing an action for constructive dismissal.

Key Takeaways for Employers

This decision highlights the importance of building an express term permitting layoffs into an employee's employment contract to mitigate against the risk of a constructive dismissal claim in the face of a layoff. Otherwise, employers will face the challenge of demonstrating an implied term and past layoff practices may not be accepted as sufficient grounds unless they included the employee.

Additionally, employers should note that positive action is required by an employee to demonstrate condonation. A letter setting out the terms of a layoff, signed by the employee, does not rise to the level of condonation, nor does an employee's failure to object to the layoff within a reasonable amount of time.

To learn more, contact a member of McMillan's Employment and Labour Relations Group.

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A Cautionary Note