

TEMPORARY LAYOFF: CONSTRUCTIVE DISMISSAL IF NOT PROVIDED FOR IN THE CONTRACT

Posted on July 14, 2016

Categories: [Insights](#), [Publications](#)

A recent Ontario decision has clarified the law on temporary layoffs and the related impact on employee claims for constructive dismissal. An employer's temporary layoff of an employee in accordance with the Ontario *Employment Standards Act, 2000* with a fixed return to work date, still resulted in a fundamental change in the employment contract, thus, constituting constructive dismissal. The Ontario Superior Court's result in *Bevilacqua v Gracious Living Corporation*, 2016 ONSC 4127 (*Bevilacqua*) highlighted the importance of employment contract's express terms in such a situation and the compensation implications of when a laid off employee refuses to return to work.

Background facts

Giuseppe Bevilacqua was employed by Gracious Living Corporation ("Gracious Living") for 15 years. On September 15, 2014, Gracious Living temporarily laid off Bevilacqua due to economic difficulties with a return date of December 15, 2014. Bevilacqua was recalled to resume work to his same position on the same terms but he refused. Instead, Bevilacqua took the position that he was constructively dismissed and commenced a claim for 15 months' salary in lieu of notice.

The employment contract had no express term permitting Gracious Living to place Bevilacqua on a temporary layoff. There was also no such implied term as the prospect of layoff had never been raised with him. Gracious Living's compliance with the Ontario *Employment Standards Act, 2000* as to what constitutes temporary layoff was irrelevant to the question of constructive dismissal, the Court summarily decided that Bevilacqua was constructively dismissed.

Employer and employee expectations

The employer's and employee's expectations about the nature of the layoff do not make the layoff any less of a constructive dismissal. The Court noted that Gracious Living may not have intended to terminate Bevilacqua but its actions still amounted to constructive dismissal. Bevilacqua admitted that he was told the layoff was temporary, not a termination. During the layoff period, he kept his company benefits, maintained a good relationship with Gracious Living and filled in for an employee. However, such expectations regarding the

nature of the layoff become relevant to determining constructive dismissal damages.

Refusal to return to work

Despite being constructively dismissed, Bevilacqua was under a duty to mitigate his damages. At trial, he failed to explain his refusal to return to work. The Court accepted that the layoff was temporary and was not due to personal reasons and that the return offer was on the same terms, particularly since Gracious Living remained friendly with Bevilacqua during the layoff. The Court decided that nothing in law or in interpersonal relationships prevented him from accepting the return offer. As a result, Bevilacqua was entitled to only 3 months of salary equaling the time period after which Gracious Living offered return to work. This meant that a claim worth five times as much was reduced based on the refusal to return to work.

Employer takeaways

The *Bevilacqua* decision emphasizes that an employer can only impose a layoff if it is specifically agreed upon in the employment contract. This is especially important to keep in mind for employers in industries that are prone to economic instability resulting in downsizing. The outcome reminds employers of the importance of including relevant layoff language where appropriate in offer letters and employment contracts. If the employer does decide to proceed with a temporary layoff without an express term, the employer's behavior towards the employee, its relationship during the layoff period and the return offer within the specified period may reduce the damages owed to the employee.

by George Waggott and Guneev Bhinder, Summer Student

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016