The Legality of Temporary Layoffs In Light of Decisions Recently Rendered In Québec and In Ontario

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Can an employer temporarily layoff an employee bound by a contract of employment for an indeterminate term for economic and administrative reasons without having to pay the employee's salary?

This question was recently brought before the Courts in both Québec and Ontario, which, as we shall see below, have opted for different paths.

In Québec, in the matter of *Groupe Lelys* v. *Lang*, Mr. Lang was hired by Groupe Lelys in May 2010, at the age of 47 years old, as a press operator. The parties concluded a contract of employment for an indeterminate term that guaranteed him a minimum of 35 hours of work per week. The contract of employment did not contain any clause pertaining to the possibility of a temporary layoff. In January 2011, the employer was confronted with economic difficulties and was forced to temporarily lay off Mr. Lang. The employer further indicated that it would pay Mr. Lang the compensatory indemnity in lieu of the minimum prior notice of termination of employment provided for under the *Act respecting Labour Standards* should the employee not be called back to work within six (6) months.

In April 2011, Mr. Lang sent a demand letter to his employer claiming he had been constructively dismissed by reason of the layoff and claiming an indemnity in lieu of prior notice of termination of employment as well as other damages. In July 2011, the period of six (6) months had passed without Mr. Lang being called back to work. The employer then confirmed the termination of Mr. Lang's employment and paid him the compensatory indemnity in lieu of the minimum prior notice of termination of employment owing under the *Act respecting Labour Standards*.

In first instance (2014 QCCS 3726), the Superior Court of Québec concluded that Mr. Lang was subject to a temporary layoff rather than a constructive dismissal, but nevertheless suggested that he was entitled to the reimbursement of his salary for the period of six (6) months following the layoff along with an indemnity in lieu of prior notice of termination of employment and other damages. The Court held that the layoff did not have the effect of terminating the contract of employment, thereby requiring the

employer to respect the guarantee of thirty-five (35) hours of work per week included in the contract of employment.

The Québec Court of Appeal (2016 QCCA 68) overturned the decision of the Superior Court and concluded that the employer did not have any obligation to pay Mr. Lang his salary despite his temporary layoff for economic reasons. Mr. Lang was only entitled to the payment of the indemnity in lieu of the minimum prior notice of termination of employment provided for under the *Act respecting Labour Standards*. Given that the contract of employment was for an indeterminate term, Mr. Lang could not legitimately argue that his salary was guaranteed.

Consequently, it appears that it is now possible in Québec to temporarily suspend both the employee's work and the payment of his salary for economic and administrative reasons even if there is no contractual clause providing for the possibility of a temporary layoff in the contract of employment.

In Ontario, however, the situation differs significantly. Indeed, in the matter of *Bevilacqua* v. *Gracious Living Corporation*, the employee was a facilities manager who had worked for the employer for fifteen (15) years. The company went through a difficult period, which caused the employer to temporarily lay off Mr. Bevilacqua for a period of three (3) months. The contract of employment did not provide for the ability of the employer to proceed to a temporary layoff. While laid off, Mr. Bevilacqua was asked by his employer to occasionally replace some of his colleagues. He accepted the first time, but declined the second time. Mr. Bevilacqua claimed to have been the subject of a constructive dismissal due to his layoff.

The Ontario Superior Court of Justice (2016 ONSC 4127) ruled that in the absence of an explicit or implicit contractual clause providing for the possibility of a temporary layoff, the employer could not impose a temporary layoff without causing the termination of the employment relationship. By laying off Mr. Bevilacqua, the employer had substantially changed the terms of the contract of employment, resulting in a constructive dismissal, even if the employer did not mean to repudiate the contract. The court ultimately granted the employee an indemnity equivalent to three (3) months of salary on the basis that he had failed to mitigate his damages and refused the employer's offer to reinstate him in his position.

Consequently, in light of the foregoing, and in order to avoid any risk, employers in Québec and Ontario should consider including specific contractual clauses in the contract of employment providing for the possibility of a temporary layoff.

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