Ontario Court of Appeal Examines Mass Termination Requirements

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In *Wood v. CTS of Canada Co.*, 2018 ONCA 758, the Ontario Court of Appeal examined employer obligations under the province's legislated requirements during mass terminations of employment. In doing so, the Court of Appeal provided guidance to employers on providing effective notice to employees, as well as on serving and providing notice to the Director of Employment Standards.

Background

On April 17, 2014, CTS of Canada Co. gave written notice to employees that it was closing a plant and that, as a result, the employment of all employees at the plant would be terminated effective March 27, 2015. The termination date was subsequently extended to June 26, 2015. In response, a class action was brought on behalf of several employees against CTS of Canada Co. and its parent corporation CTS Corp. (collectively, CTS).

Ontario's *Employment Standards Act, 2000* (ESA) and its regulations impose a number of requirements in the case of mass termination. Under the ESA, mass termination provisions apply where an employer terminates the employment of 50 or more employees in the same four-week period. The following requirements apply to mass terminations:

1. The employer must give at least eight weeks' notice of termination;
2. The employer is required to give a Form 1 to the Director of Employments Standards, which includes the following information:
    1. The number of employees at the workplace and the number of employees whose employment will be terminated;
    2. The date on which terminations will be effective; and
    3. Whether the employer has implemented or discussed with their employees any alternatives to termination.

The eight weeks' notice of termination is not deemed to have been given to employees until the Director of Employment Standards receives the Form 1.

1. The employer must post the Form 1 in the employer's establishment.

CTS did not serve and post the Form 1 information until May 12, 2015. This was more than a year into the notice period provided to employees and less than eight weeks prior to the termination date, June 26, 2015.

The Court's Analysis

The class of employees brought a motion for summary judgment to address three issues in the litigation.

First, the court was asked to determine whether the employer was required to serve and post the Form 1 in April 2014, when notice of termination of employment was given to the employees. The motion judge concluded that the ESA required employers to serve and post the Form 1 when it gave notice to employees on April 17, 2014 and not eight weeks before the effective date of the termination. In doing so, the motion judge concluded that the notice of termination was not effective until CTS served and posted the Form 1 on May 12, 2015 and, accordingly, the court invalidated the 13 months of working notice CTS provided to employees prior to serving and posting the Form 1.

The Court of Appeal disagreed. Rather, it confirmed that an employer is only required to serve and post the Form 1 at the beginning of the statutory eight week notice period, which, in this case, was at the beginning of May. The Court of Appeal found that CTS was 12 days late in serving and posting the Form 1 and, as such, the class members were entitled to an additional 12 days of pay in lieu of notice.

Second, the court was asked to consider whether parts of the working notice period should be invalidated as a result of overtime hours worked during the notice period. During the working notice period, CTS ramped up production at the plant in order to "bank" inventory, which could be supplied while it shut down the plant in Ontario and set up operations in Mexico. In doing so, several employees worked more than the statutory maximum 48 hours in a work week without approval from the Director of Employment Standards. In addition, the motion judge found that some employees did so involuntarily.

The Court of Appeal agreed with the motion judge in finding that CTS was not entitled to credit for working notice for any week in which an employee worked overtime contrary to the ESA or in which employees were forced to work overtime that had a significant impact on their ability to find new employment. This notice was not "reasonable" in that it breached the ESA overtime provisions and did not consider the quality of the employees' opportunity to find alternate work.

Third, the court was asked to consider whether notice provided to five of the employees who worked more than 13 weeks beyond the original termination date received effective notice of termination in April 2014, despite several extensions to their termination date. The ESA permits employers to continue to provide temporary work to employees for up to 13 weeks after the termination date specified in the notice of termination without giving a further notice of termination. If temporary work exceeds 13 weeks, fresh notice is required and it must be clear and unambiguous, including a final termination date.

The Court of Appeal agreed with the motion judge in finding that the five employees who worked more than 13 weeks beyond their original termination date only received common law working notice from September 18, 2015, which was the date on which

they received notice of their final termination date, October 30, 2015. The Court of Appeal agreed that multiple extensions to the final date of termination created uncertainty as to when the employees' employment would terminate and, accordingly, nullified the initial notice given in April 2014.

The Takeaway

Employers should be aware of the mass termination employment provisions in applicable employment legislation across Canada. The definition of mass termination varies by province, as do the employer's obligations that flow from such a designation. As demonstrated in *Wood v. CTS of Canada Co.*, the statutory requirements can have important implications on the notice provided to employees and how such notice is provided. In Ontario, the Court of Appeal helped to clarify some of these obligations in *Wood v. CTS of Canada Co.*

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