Compliance with The Temporary Layoff Provisions of The ESA Does Not Insulate Employers from Constructive Dismissal Claims

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The Ontario *Employment Standards Act, 2000* provides that a temporary layoff will not trigger a termination of employment resulting in the obligation to pay termination pay if the layoff does not exceed 13 weeks in a period of 20 consecutive weeks, or 35 weeks in a period of 52 consecutive weeks. These statutory layoff provisions are presumably what led Gracious Living Corporation to believe that it could lay off its Facilities Manager of 15 years, Giuseppe Bevilacqua, for a three month period in September of 2014 without adverse consequences as it sought to weather an economically difficult phase in its operations. Mr. Bevilacqua saw things differently and sued his employer for wrongful dismissal, seeking compensation in the amount of 15 months' salary in lieu of notice. The case was heard by the Ontario Superior Court by way of a summary judgment motion in April of 2016.

In its decision of June 22, 2016 (*Bevilacqua v. Gracious Living Corporation*, 2016 ONSC 4127), the Court reiterated the Court of Appeal's determination in *Elsegood v. Cambridge Spring Service*, 2011 ONCA 831, that an employer has no right to impose a unilateral temporary layoff on an employee, even if it is contemplated by statute, unless that right was specifically agreed to in the contract of employment.

The Court heard evidence that Mr. Bevilacqua's employer told him of the temporary layoff on September 15, 2014 and that he would be recalled to work within three months. Mr. Bevilacqua was not told that his employment was being terminated and he continued to be covered under the employer's benefits plan throughout the period of layoff. The Court also heard that during the layoff period, Mr. Bevilacqua filled in for an absent employee at the employer's request and that in October of 2014, six weeks after the layoff, Gracious Living asked Mr. Bevilacqua to work as a guard at the gatehouse of the company's property. Although while actively employed, Mr. Bevilacqua had on occasion replaced other employees in this role, he refused his employer's offer and five days later issued a Statement of Claim against the company in which he claimed to have been constructively dismissed. Upon receipt of the Statement of Claim, Gracious Living wrote to Mr. Bevilacqua's lawyer reiterating that the layoff was temporary and confirming that it was prepared to reinstate Mr. Bevilacqua in his Facilities Manager position without change as of December 15, 2014.

The main issue which the Court had to address was whether Mr. Bevilacqua's temporary layoff was permitted or whether it had brought about his constructive dismissal. The Court concluded that in the absence of an express or implied contractual term permitting the layoff, Gracious Living could not impose a temporary layoff on Mr. Bevilacqua without triggering the termination of his employment. In so finding, the Court highlighted that:

1. The fact that the layoff was conducted in accordance with the *Employment Standards Act, 2000* was irrelevant to the issue of constructive dismissal;
2. The inability to lay off applies even where the employer does not intend to repudiate the employment contract; and
3. Neither Gracious Living nor Mr. Bevilacqua's expectations about the temporary nature of the layoff "made it any less of a constructive dismissal".

The Court also considered the issue of Mr. Bevilacqua's duty to mitigate his damages. It concluded that Mr. Bevilacqua's inability to secure new employment until 15 months after the layoff was attributable to his "lackadaisical" approach to mitigation, noting that he failed to send out his résumé and to actively seek out job opportunities, while telling prospective new employers in the first few months of the layoff that he was merely looking for temporary employment.

Finally, the Court found that Mr. Bevilacqua could not adequately explain his refusal to accept Gracious Living's offer of reinstatement to his former position, noting that Gracious Living had always entertained a friendly relationship with its employee which would have made reinstatement feasible.

Concluding that Gracious Living had satisfied its onus to establish that Mr. Bevilacqua had not adequately mitigated his damages, and taking into account the employer's offer of reinstatement, the Court limited the damages award to the three month period during which Mr. Bevilacqua would have been out of work had he accepted his employer's offer to return to work in December of 2014.

The *Bevilacqua* decision serves as an important reminder following the 2011 Court of Appeal decision in *Elsegood* that at common law, an employer has no right to temporarily lay off an employee, and that absent an agreement to the contrary, a unilateral layoff will bring about a substantial change in the employee's employment sufficient to support a constructive dismissal claim. While the right to lay off is recognized in unionized environments and typically set out in the applicable collective agreements, where employment relationships are individual in nature, in order to secure the right to temporarily lay off an employee to deal with issues of cyclical business activities or economic instability, the employer will need to specifically address this issue at the time of hiring. On a more positive note, an employee's duty to mitigate losses following a temporary layoff is not attenuated by the non-existence of a right to lay off.

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