Lay Off the Layoffs? The Requirement for Proper Temporary Layoffs

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In a recent Alberta Provincial Court decision, *Dunbar v. Northern Air*, 2019 ABPC 179, the court reminds employers that layoff is not another word for termination despite their frequent interchangeable use in common parlance. In *Canada Safeway Ltd v. RWDSU, Local 454,* [1998] 1 SCR 1079, the Supreme Court of Canada described the term layoff as a cessation of employment where there is the possibility or expectation of a return to work. The employment relationship is suspended rather than terminated.

The Facts

In this decision, the employee, Dunbar, was hired in June of 2014, but his employment agreement was silent on layoffs. The employer's handbook did reference temporary layoffs with the possibility of recall as a possible consequence to a variety of business conditions, however, the handbook and the signed acknowledgement both emphasized that the handbook and policies of the employer are not an employment contract. The employee has no authority to bind the employer to any of the terms of the handbook. The employment agreement also did not reference the handbook as a condition or term of the agreement.

On June 30, 2016, the plaintiff received a call from the employer, Northern Air, informing him that he would be laid off effective that day due to restructuring and downsizing. The employee felt his employment had been terminated, but the defendants responded that it was a layoff rather than termination. In September 2016, the employer sent the employee a recall letter, which the employee declined.

The Decision

In this decision, the court applied the common law rule that an employer could only lay off employees when the employer had a contractual right to do so. The court found the handbook's reference to layoffs had no bearing on the employee's employment, because it was not a condition of the employment agreement. There were also no other agreements between the parties regarding layoffs, thus the employee's employment was found to be terminated, and the employee was entitled to common law reasonable notice.

Statutory Provisions

Section 62 of the *Employment Standards Code* (the Code) does allow an employer to temporarily lay off an employee, however, whether the Code provisions oust the common law requirement that the right to layoff must be contractually agreed upon may still be in question. The Court of Appeal in *Vrana v. Procor*, 2004 ABCA 126, chose to leave this issue undecided, while the court in *Dunbar* determined that the statutory provisions did not alter the common law position and only applied when the employer has a contractual right to lay off an employee. As a result, it will be important to see whether future case law will further develop this issue.

Although the court in *Dunbar* did not analyze the temporary layoff provisions under the Code (because the court found that the claim was proceeding under the common law, even if the Code provisions were considered), the employer's actions also failed to comply with the Code based on the facts provided. In *Vrana*, the court found that at a minimum, the employer should provide a fair notice to the employee of its intention to lay off, and the notice should contain not only the fact of the temporary layoff and its effective date but also the relevant sections of the Code outlining the effect of that layoff (ss.62, 63 and 64). The requirements for the content of the notice is entrenched under section 62(3) of the Code.

The Code requires this notice to be given:

- at least one week prior to the date that the layoff is to commence, if the employee has been employed for less than two years;
- at least two weeks prior to the date that the layoff is to commence, if the employee has been employed for two years or more; or
- if unforeseeable circumstances prevent an employer from providing the notice in accordance with the above, as soon as is practicable in the circumstances.

It is also important to note that the layoff period is not indefinite. Under the Code, after 60 days of layoff within a 120-day period, employment will be deemed to have been terminated unless:

- during the layoff the employer, by agreement with the employee, pays the employee wages or an amount instead of wages, or makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan or similar plan; or
- there is a collective agreement binding the employer and employee containing recall rights for employees following layoff.

Conclusion

In light of the *Dunbar* decision, it is recommended that if employers would like to keep their option to lay off open, this specific right should be explicitly included in their employment agreements, and employers should ensure that the statutory requirements for temporary layoffs under the Code are also followed.

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