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Employers' Legal Obligations with Employee Severance

Ontario Motor Coach Association
July 22, 2021



Agenda

- 1. Employer Termination Obligations**
- 2. Three Pandemic Case Studies on Temporary Layoffs**
- 3. What if Employers Can't Fulfill their Termination Obligations?**
- 4. Best Practices for Employers**

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1. Employer Termination Obligations



Statutory Obligations



Statutory Obligations

- Employment standards legislation sets out minimum notice and severance for termination
- *Employment Standards Act, 2000* (provincially-regulated employers)
- *Canada Labour Code* (federally-regulated employers)



Minimum ESA Notice Required:

Length of Service	Notice Required
Three months but less than one year	One week
One year but less than three years	Two weeks
Three years or more	One week per year up to eight weeks maximum



Minimum ESA Notice

- May pay *in lieu* of statutory notice (“termination pay”)
- All benefits must continue over the statutory notice period
- Employee deemed to be actively working for benefits purposes



Mass Termination Notice

- Mass termination provisions where 50 or more employees terminated within 4 weeks
- Must give notice to Director of Employment Services in prescribed form, and post in workplace
- No working notice given to employees counts until notice given to Director
- Increased notice periods



Statutory Severance Pay

- Under Ontario ESA:
 - if Ontario payroll greater than \$2.5 million annually, or
 - if 50 or more employees terminated within 6 months due to permanent discontinuance of all or part of business



Statutory Severance Pay

- Employees with 5+ years service:
 - One week severance pay per year of service (+1/12 week per month for part years)
 - Maximum of 26 weeks
- Must be paid, can't require work in return
- No requirement to continue benefits

Statutory Exemptions

- Wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned, nil
- 3 month probationary period, nil
- Completion of fixed term contract (less than 12 month term), nil
- Completion of definite task, nil



Statutory Exemptions

- Where contract frustrated (other than by illness or disability), nil
- After refusing reasonable alternative job
- If does not return following a temporary layoff
- Terminated as a result of strike or lockout
- In some cases, retirement



Canada Labour Code

- For federally-regulated employers
- 3 month probationary period, thereafter 2 weeks notice of termination
- Employees with >1 year service get severance pay = greater of 5 days pay or 2 days per year of service



Common Law Notice

Common Law Notice

- Statutory notice and severance are minimum entitlements
- Superimposed on these are the common law entitlements (not additive)
- Judge-made law, contract
- Courts will look to the employment contract: Is there an express termination clause? Is it enforceable?



Binding Notice Terms

- Must be consideration
- Cannot be less than statutory minimums
- Cannot contract out of ESA, CLC or applicable employment legislation
- Cannot be unconscionable
- Cannot be coercion
- Should not be stale-dated
- Must be properly drafted to cap notice obligation



No Express Termination Clause

- Either no written employment contract, or contract is silent on termination
- Courts will imply obligation to provide “reasonable notice” of termination
- What is “reasonable”?



Factors in Assessing Reasonable Notice

(a) character of employment

(b) length of service

(c) age

(d) availability of similar employment

...having regard to the experience, training and qualifications of the employee

-Bardal v. The Globe and Mail Ltd., (1960) 24 D.L.R. (2d) 140 (O.H.C.) at p. 145



Duty to Mitigate

- At common law, dismissed employees have a duty to mitigate their damages
- Must take reasonable efforts to find comparable employment
- Must accept comparable offer



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2. Three Pandemic Case Studies on Temporary Layoffs



O.Reg 228/20 Infectious Disease Emergency Leave (“IDEL Regulation”)

- During the “COVID-19 period”, non-unionized employees are “deemed” to be on a job-protected emergency leave if the employer has temporarily reduced their workforce due to COVID-19
- The temporary layoff will not constitute a constructive dismissal if related to COVID-19



***Coutinho v Ocular Health Centre
Ltd.***

2021 ONSC 3076



Coutinho v Ocular Health

Facts

- The plaintiff was a manager at an ophthalmology clinic
- May 1, 2020: The plaintiff was advised that her clinic was closed until further notice, but that she would receive pay



Coutinho v Ocular Health (cont'd)

Facts (cont'd)

- May 29, 2020: The plaintiff was placed on temporary lay-off
- June 1, 2020: The plaintiff commenced a claim for constructive dismissal
- July 22, 2020: The plaintiff was re-employed



Coutinho v Ocular Health (cont'd)

The Court's Decision

- The IDEL Regulation did not preclude a claim for constructive dismissal at common law
- The plaintiff was allowed to treat the unilateral imposition of a layoff as a termination of her employment contract



Taylor v Hanley Hospitality Inc.
2021 ONSC 3135



Taylor v Hanley Hospitality

Facts

- The plaintiff was an employee at a Tim Hortons franchise
- Due to provincial state of emergency, Tim Hortons closed all store fronts
- March 27, 2020: The plaintiff was laid off
- August 18, 2020: The plaintiff was recalled



Taylor v Hanley Hospitality (cont'd)

Facts (cont'd)

- The plaintiff claimed that her layoff was a constructive dismissal
- Tim Hortons argued the IDEL Regulation precluded a claim for constructive dismissal at common law
- The Court agreed with Tim Hortons



Taylor v Hanley Hospitality (cont'd)

The Court's Decision

“All temporary layoffs relating to COVID-19 are deemed to be IDELs, retroactive to March 1, 2020 and prospective to the end of the COVID-19 period. As such, the plaintiff’s layoff is no longer a layoff. It is an IDEL and the normal rights for statutory leave are applicable (e.g., reinstatement rights, benefit continuation). This means any argument regarding the common law on layoffs has become inapplicable and irrelevant.”



Fogelman v IFG
2021 ONSC 4042



Fogelman v IFG

Facts

- IFG was a recruiter in the financial services industry
- The plaintiff was a managing director
- March 16, 2020: The plaintiff was laid off due to a downturn in business
- The plaintiff immediately advised that he treated the layoff as a constructive dismissal

Fogelman v IFG (con't)

The Court's Decision

- There was no provision in the employment contract permitting IFG to lay off the plaintiff
- At common law, an employer has no right to layoff an employee unless the employment contract provides that they may do so



Fogelman v IFG (con't)

The Court's Decision

“As Mr. Fogelman was not pursuing his rights under the ESA but rather was pursuing his civil remedies, O.Reg. 228/20 does not apply to Mr. Fogelman’s claims made under the common law pursuant to s. 8(1) of the ESA.”



Temporary Layoffs & IDEL: Have the Courts Got it Right?



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3. What if Employers Can't Fulfill their Termination Obligations?



Bankruptcy & Insolvency Act

Notice of Intention to Make a Proposal (“NOI”)

- Permits companies to restructure their affairs
- Stay of proceedings: at least 30 days and up to 6 months
- A terminated employee can be a creditor
- Creditors vote on the company’s “Proposal” to compromise debts



Companies' Creditors Arrangement Act (“*CCAA*”)

Plan of Arrangement

- The CCAA applies to corporations who owe more than \$5 million to creditors
- The CCAA allows companies to restructure through a formal Plan of Arrangement
- Creditors can vote on the Plan of Arrangement



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4. Best Practices for Employers



Best Practices for Employers

1. Include a right to temporary layoff in the employment contract
2. Ensure you have a strong termination clause that limits the notice obligations to statutory minimums
3. Conduct a termination interview & draft a termination letter



Questions?



Thank you!



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