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EMPLOYERS BEWARE:

THE MYTH OF TEMPORARY LAYOFF MY RESULT IN WRONGFUL DISMISSAL LIABILITY

The primary purpose of this article is to examine, in a non-union setting, some instructive British Columbia cases on the “temporary layoff” provision in the B.C. *Employment Standards Act* (“*ESA*”) with a view to providing the reader some guidance on the subject matter by setting out governing principles for its interpretation. The author will conclude by suggesting the temporary layoff definition of the *ESA* should be amended to more clearly reflect the intent of the statute as articulated in recent court decisions.

The *ESA*, in section 1, provides an exclusive definition of “temporary layoff” as follows:

“temporary layoff” means

(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and

(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

Subparagraph (a) exclusively deals with a unionized context because the term “right of recall” is also defined in the *ESA* and relates only to such rights in a collective agreement. It is subparagraph (b) that addresses the non-unionized context and is the subject of this paper.

In the same section, the *ESA* provides an inclusive definition of “termination of employment” that specifically includes a layoff, but excludes a “temporary layoff”.

“termination of employment” includes a layoff other than a temporary layoff;

On the plain language of the definition of “termination of employment”, there appears to exist a difference between a “layoff” and a “temporary layoff” and when considered with the definition of “temporary layoff” in section 1, it is indeed conceivable why some may and do view the *ESA* as granting an employer a right to effect a “temporary layoff” that does not equate to a termination. However, the *ESA* does not provide a definition of “layoff” itself nor in clear or any language, outside the definition of “temporary layoff”, set out an affirmative statutory right of an employer to layoff an employee temporarily. As a result, the legislation’s precise intention on this issue is, in fact, unclear and requires interpretation. In particular, can an employer temporarily layoff employees in hard times, and avoid the pecuniary consequences of termination?

A reference to the etymology of “layoff” shows that it was once by nature a temporary status, but has developed into a euphemism for permanent termination:

layoff also lay off; 1889, "rest, respite;" from lay (-) + off. Via seasonal labor with periodic down time, it came to have a sense of "temporary release from employment," and by 1960s was being used somewhat euphemistically for permanent releases of masses of workers by employers.

Dictionary.com, "layoff," in Online Etymology Dictionary. Source location: Douglas Harper, Historian. <http://dictionary.reference.com/browse/layoff>. Available: <http://dictionary.reference.com>. Accessed: October 12, 2010.

The Courts came to the same conclusion in *Girling v. Crown Cork & Seal Canada Inc*². Justice Saunders examined the term “layoff”, comparing the union and non-union contexts. He concluded that no “middle ground” existed in the non-union context because of the lack of any right of recall. A “layoff”, he said, was just a euphemism for termination :

13 In my view the meaning which the company seeks to give to the term "layoff" is inappropriate to a non-union setting, which is governed by the law of employer and employee. A collective agreement in a union setting often includes layoff and recall provisions: in a union setting it is common for employees who lose their employment, temporarily or permanently, to have the right of first call to a job for which the employee is qualified which becomes available within a negotiated time period. This contrasts with the non-union setting where, in the absence of express provision in an employment contract or legislative protection, there is no right to first call to an available position.

14 Because the employee who loses his or her employment in a non-union setting usually has no right to be re-employed once his or her employment is terminated, **the term "layoff" in the non-union setting has no technical meaning. It is simply a euphemism which connotes loss of employment without attribution of wrongdoing to the employee.** It is often used to explain loss of work through reduction in the work force or plant closure and always means the employee is no longer actively at work. **The law of employer and employee does not have a middle ground between employment and termination such as proposed by the company. [emphasis added]**

Thus the term “layoff” is synonymous with termination unless a right of recall exists expressly or implicitly in the employment contract. Then what is the effect of the *ESA* concept of a “temporary layoff”? In particular, this begs the question of how this statutory concept of a “temporary layoff” interacts with the common law concept of layoffs that is a termination of the employment relationship.

At common law, it is the fundamental nature of an employment relationship that the employee attend work and receive payment for that work. A layoff, even if temporary, is a radical change to the very root of the employment relationship and would therefore be grounds for a claim in constructive dismissal.

This argument was accepted by the B.C. Supreme Court in *Archibald v. Doman-Marpole Transport Limited and Doman Industries Ltd*.³ In that case, the employee claimed damages for wrongful dismissal after the employer unilaterally laid him off indefinitely claiming a downturn in its business. The employer argued that the employee was only laid off temporarily due to lack of work and advised, at the time of layoff, “his re-engagement would be considered in the near future.” The Supreme Court rejected the employer’s argument (at para. 4):

Rather than being a defence that position amounts to an admission of liability. There is nothing more fundamental to a contract of employment than that the employee be employed and that he be paid for his services. Doman unilaterally changed those fundamental terms. One can appreciate the need for employers to cut down on management or supervisory staff during economic downturns but the employee, subject to contractual arrangements, is still entitled to reasonable notice or payment in lieu of notice.

The *Archibald* decision, subsequently, was affirmed in principle, but distinguished in application, in the appeal decision in

*Haverstock v. Citation Industries Ltd.*⁴. In that case, the plaintiff was one of many non-unionized employees who did not have written contracts of employment. A strike occurred with the unionized employees, and, shortly after, the plaintiff and the non-union employees were temporarily laid off without a fixed date for return. The employer applied to the governing body, then the Labour Standards Branch, for extensions before the layoffs were deemed to be dismissals. The employees, including the plaintiff, signed a petition to support the extension. When the strike ended, the employer recalled the employees, but not the plaintiff. The trial judge dismissed the claim for other reasons, holding that he did not have to consider the temporary layoff issue because the employees' petition supporting the extension was sufficient proof that the plaintiff consented to the layoffs until needed. On appeal, the trial decision was upheld, and Esson J.A. referenced the decision in *Archibald*, holding that, while correct on its facts, it was distinguishable because of the petition.

Therefore, as early as 1986, the Courts equated layoff with termination, unless the employee somehow acquiesced to the layoff. However, these early cases were not dealing with the *ESA* provisions, which, arguably, on their face, appear to contemplate temporary layoffs short of termination.

It was not until *Simmons v. United Gear & Machine Works Ltd.*⁵ that British Columbia courts first encountered an employer claiming to temporarily layoff an employee pursuant to the *ESA*. In *Simmons*, the plaintiff, a 60 years old man who worked for seven years as a lathe operator, was told one day he was "finished". The employer later told the employee he was being temporarily laid-off because of a shortage of work and in accordance with the *ESA*. When the employee threatened a lawsuit, the employer "recalled" the employee to work. The Court however found that the offered "recall" was a sham and only a response to the potential litigation.

On the specific subject of temporary layoffs, the Court avoided making any express comments, save for the following brief statement:

In the absence of a contract to the contrary, an employer may dismiss an employee because of lack of work.

However, he must give the employee reasonable notice or pay in lieu thereof. In the present case, the defendant did neither. (per Mackoff J. at para. 15)

While the Court found as a fact that the "temporary" nature of the lay off was a sham, this holding is disappointing as the court had an opportunity to clarify the effect of the *ESA*'s "temporarily lay-off". Instead, the Court commented only on employers' general right to lay employees off due to work shortages. As such, it offered little certainty as to how the *ESA* should interact with common law principles and whether the *ESA* may trump common law.

At the time of the *Simmons* decision, the relevant B.C. provision in the *ESA* read:

"temporary layoff" means an interruption of an employee's employment **by an employer** for a period

(a) not exceeding 13 weeks of layoff in a period of 20 consecutive weeks, or

(b) exceeding 13 weeks of layoff, **where the employer recalls** the employee to employment within a time fixed by the director; [*emphasis added*]

This, paired with the emphasized portion of the termination provision in s.44 of the then *ESA* below, arguably, provided the context and identified what an employer had to do before "temporary layoff provision" became effective.

44. **Where an employer** temporarily lays off an employee and the layoff exceeds a temporary layoff, the employee shall be deemed to have been terminated at the commencement of the temporary layoff and the employer shall pay the employee the severance pay under section 42(3).

[*emphasis added*]

In 1995, the entire B.C. *Employment Standards Act* was repealed and replaced. In an attempt to include simpler language,⁶ the rewritten *ESA* removed the references to the employer entirely. The definition was changed to that cited earlier, and s.44 became s.63 (5):

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

These changes in the *ESA* removed the key context of the provisions leaving only a description of what happens to the employee when a “temporary layoff” occurs, but no context to how an employer affects a “temporary layoff”. As unclear as the temporary layoff provision in the pre-1995 *ESA* may have been in terms of identifying whether or not an employer had an affirmative statutory right to temporarily layoff an employee, the attempt to simplify it subsequently in 1995, in this writer’s view, did nothing to add clarity on this issue and, arguably, had the reverse effect and perhaps caused greater ambiguity or confusion.

At the time *Simmons* was decided, Courts in other jurisdictions had already taken the position that the relevant provincial employment standards legislation did not displace common law principles with respect to reasonable notice. Unfortunately, B.C. would have to wait a full two years until the decision of *Collins v. Jim Pattison Industries Ltd.*⁷

In *Collins*, the plaintiff was employed as a general mechanic. He had no written contract but had been employed by the defendant for 16 years. As a result of bad economic conditions, he was laid off for an unspecified period. At the time he was laid off, the plaintiff was 56 years of age and had been a certified mechanic for 17 years. The defendant sought advice from the Employment Standards Branch and was advised that the legislation provided for a 13 weeks lay-off without termination of employment. In its decision, the court specifically addressed the employer’s defence of “temporary layoff”. The employer argued that the definitions in the *ESA* (then the same definition addressed in *Simmons*) recognize a distinction between termination and temporary lay-off. The plaintiff argued that had the legislature intended to grant such a right, it would have done so expressly. The court sided with the plaintiffs (paragraph 23):

In my view, the Act does not grant all employers the statutory right to temporarily lay off employees, regardless of the terms of their employment contract. Rather than creating new rights, the Act appears to be qualifying employment agreements in which the right to lay off already exists. Therefore, unless the right to lay off is otherwise found within the employment relationship, the above cited sections of the Act are not relevant.

The *Collins* decision solidified British Columbia’s position that the *ESA* provisions for “temporary layoffs” do not confer additional rights on employers to temporarily layoff their employees. *Collins* has become a leading authority cited in apparently all subsequent cases on the topic in B.C. and frequently also cited in court decision of other provinces on the subject.⁸

However, the British Columbian position did not universally resolve the issue within Canada. In Ontario, for example, the decision of *Stolze v. Delcan Corp.*⁹ took a different approach. Although the facts of *Stolze* were similar to that in *Collins* – an employee was temporarily laid off due to shortage of work – the trial judge upheld an adjudicator’s decision which found that absent a contractual provision prohibiting temporary lay-offs, the Act “[o]bviously...contemplate[d] lay-offs without pay.”¹⁰

It was clear statutory language that led the Alberta courts to a similar conclusion. The court in *Vrana v. Procor Ltd*¹¹ addressed a revised legislation that had come into effect after the *Collins* decision. The Court held that the “plain and express language of [the temporary layoff provision] entitles an employer who wishes to maintain an employment

relationship to temporarily lay off the employee.”¹² As a result, the employee’s right to commence a wrongful dismissal claim at common law was suspended by the ESA for 13 weeks should the employer claim to be temporarily laying off the employee. In its holding, the court remarked that there existed a potential for abuse of the system by employers, however, notwithstanding this potential, “the language [of the statute is] clear, explicit, and unambiguous.”¹³

Although at first glance it is hard to argue with some of the comments in these two judgments, the decision of *Stolze* was distinguished several times¹⁴ before it was eventually reversed on appeal, though not because of an error in the legislative interpretation, but because the layoff was held to be permanent. Similarly, *Vrana* was reversed on other grounds, however, it was subsequently criticised in *Turner v. Uniglobe Custom Travel Ltd.*¹⁵ for failing to consider the express provision in the legislation that prevents abrogation of the common law rights and claims. The *ESA* in British Columbia contains a similar provision in s. 118:

Right to sue preserved

118 Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

The *Turner* decision also noted the similarity in the employment standards legislation of Ontario and British Columbia, both of which describe temporary layoffs, not as a statutory right to layoff, but as a period of time, which, if exceeded, resulted in termination.¹⁶

However, as the court in *Vrana* pointed out, the legislation of British Columbia and Ontario are “not ad idem” with their Albertan counterpart. The Alberta provision identifies the temporary lay off as a specific power the employer can exercise under certain conditions:

If an employer wishes to maintain an employment relationship without terminating the employment of an employee, the employer **may** temporarily lay off the employee.¹⁷

[emphasis added]

However, despite the differences in B.C., Ontario, and Alberta legislation, the Court in *Turner* concluded that the decisions regarding temporary layoffs in those provinces should not be ignored.¹⁸ In particular, the Court identified the decision in *Glover v. SNC Lavalin Inc.*, 1998 ABQB 752, which considered *Collins* applicable despite the difference in wording of the provincial acts.

The *Turner* decision also buttressed its reasoning for adopting the *Collins* approach by referring to the 1998 decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (SCC) at para. 26, which stated:

...since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be interpreted in favour of the claimant.

In concluding, the Court stated that if it were incorrect in its interpretation of the *ESA* and associated rights, that perhaps legislative reform would be in order to clarify whether the temporary layoff provisions are rights granted by statute.¹⁹

After the decisions in *Collins* and *Turner*, the law appeared clear and settled in Canada that employers do not have a statutorily granted right to temporarily layoff employees. However, despite the apparent consensus of the law, the issue

does not appear to have been laid to rest. The writer suggests that there remains a practical issue in that the very reforms called for in *Turner* have not been implemented and the legislative scheme, intended to provide guidance and clarity to employers and employees alike, continues to inadvertently mislead the parties on the issue of temporary layoffs.

In B.C., 8 years after *Collins*, in *Connolly v. Regency Import Automobiles Inc.*,²⁰ an employer was misled by the language of the *ESA* into thinking temporary layoffs were permitted. While the Court dealt only with the wrongful dismissal claim, this action shows that *ESA* language has the capacity to mislead employers. As a result, employers facing difficult financial and employment decisions are susceptible to an unnecessary error that could lead to significant and costly litigation.

To add to the confusion, the courts have not always been clear in the language of their judgments. An example of this is the 2005 Ontario Superior Court decision of *Bryson v. Print Key Inc.*²¹ In that case, the court had to evaluate whether *Wallace* damages²² should be awarded to an employee based on the employer waiting until the end of the 13 week temporary layoff to pay severance pay. The plaintiff argued it was bad faith for the employer to wait so long when they knew they were not going to recall the plaintiff. While the court did not pursue a discussion of whether a contractual right to temporary layoff exists, it went on to describe the temporary layoff provision in the *ESA* as a statutory benefit provided to an employer. This would appear to contradict the prior jurisprudence holding that no such statutory right existed.

Finally, the recent decision of British Columbia Supreme Court in *Besse v. Machner*²³ demonstrates yet another example of an employer misunderstanding the temporary layoff provision in the *ESA* and the court holding the employer accountable for the mistake. In *Besse*, Dr. Machner, the defendant dentist, faced a downturn in business. He offered the plaintiff reduced hours, but she refused. Relying on the *ESA*, and after being misinformed by the Employment Standards Branch, Dr. Machner temporarily laid the plaintiff off. However, when he discovered his error, he immediately offered to return her to work with back pay and benefits as though no layoff had occurred.

Dr. Machner argued that he never had the requisite intent for repudiating the employment contract. He intended to bring the plaintiff back and he held an “honest, mistaken belief that the

Employment Standards Act conferred on employers the power to impose a temporary layoff”. However, the Court was not persuaded (para. 80):

In light of these authorities, it is irrelevant whether Dr. Machner mistakenly or unintentionally repudiated Mrs. Besse’s contract of employment, as a fundamental breach of contract occurred as a matter of fact. The defendant breached an essential term of Mrs. Besse’s contract of employment, as the continued attendance of an employee at the place of work, for pay, is central to the employer-employee relationship. Moreover, even if I accepted the defendant’s submission that an employer must evince a clear intention to repudiate the employment contract before a temporary lay-off constitutes constructive dismissal, I find the defendant’s breach, although based on an incorrect understanding of the law was motivated by a clear desire to reduce expenditures, and cannot be considered unintentional.

The *Besse* decision shows that the unclear language of the *ESA* is not only misleading, but can have liability consequences on employers. Conversely, in the case of employees, it is likely that many, on cursory examination of the *ESA*, have mistakenly accepted temporary layoffs believing the language of the *ESA* permits employers the right to layoff temporarily.

Interestingly, the Employment Standards Branch, on its website, appears to hold *Besse* as the final word on temporary layoffs, announcing this case as the preclusion of temporary layoffs:

A September 2009 decision of the BC Supreme Court has changed how the Director of Employment Standards applies the temporary layoff provisions of the Act. These provisions only apply where temporary layoff is provided

for in the contract of employment or occurs with the consent of the employee. For further information, see the Termination of Employment factsheet or the temporary layoff provisions in the Interpretation Guidelines Manual. <http://www.labour.gov.bc.ca/esb/>

On November 2009, the Employment Standards Branch provided a factsheet on termination that clarifies that the *ESA* does not give the right to temporarily layoff employees:

Temporary layoff

A fundamental term of an employment contract is that an employee works and is paid for his or her services. Therefore, any layoff, including a temporary layoff, constitutes termination of employment unless the possibility of temporary layoff:

is expressly provided for in the contract of employment;

is implied by well-known industry-wide practice (e.g. logging, where work cannot be performed during “break-up”); or

is agreed to by the employee.

In the absence of an express or implied provision in an employment agreement that allows temporary layoff, the Act alone does not give employers a general right to temporarily lay off employees.

<http://www.labour.gov.bc.ca/esb/facshts/termination.htm>

It is clear from the Branch’s above publications that it recognizes some clarification is needed to convey to the general public the proper interpretation of the *ESA*. However, what is missing at present is a change in the clear legislative language. It is a fundamental purpose of the *ESA* to facilitate employment disputes in this Province, and in particular, disputes regarding the interpretation of the very rights provided under the *ESA*:

Purposes of this Act

2 The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

[emphasis added]

The courts have wrestled with the interpretation issue and there appears, for the moment, a consensus on the effect of the *ESA* temporary layoff provisions. However, the language of the *ESA* continues to mislead employers and likely employees as well, which necessarily means that the rights of each party are not being properly protected. The writer suggests that legislative reform, as called for in the Albertan case in *Turner, supra*, is absolutely necessary in British Columbia to

achieve the goals of the *ESA* with regards to the issue of “temporary layoffs”.

End Notes

1 RSBC 1996, c.113

2 [1994] B.C.J. No. 164, affirmed in (1995), 127 D.L.R. (4th) 448

3 [1983] B.C.J. No. 1284 [need appeal decision]

4 [1986] B.C.J. No. 402

5 [1993] B.C.J. No.630 (QL) (B.C.S.C.)

6 Hansard Debates, May 24, 1995

7 [1995] B.C.J. No.1201 (QL); 1995 CanLii 919; 7 B.C.L.R. (3d) 13 (B.C.S.C.)

8 See for example *MacDonald-Ross v. Connect North America Corp.*, 2010 NBQB 250 at para 12, and *Pryor v. Taylor's Feed and Tires Ltd.*, 2009 NBQB 346 at para 13 (New Brunswick); *Turner v. Uniglobe Custom Travel Ltd.*, 2005 ABQB 513 at para 48 (Alberta); *Stolze v. Delcan Corp.*, [1998] O.J. No. 4917 (QL) at para 20 and *Gust v. Beaver Foods Ltd.*, [1997] O.J. No. 5405 (QL) at para 22 (Ontario); and *Crawford v. Guigné International Ltd.*, 2007 NLTD 134 at para 21 (Newfoundland).

9 16 C.C.E.L. (2d) 244 (On. Gen Div.), reversed for other reasons in 36 O.R. (3d) 323 (CA)

10 *Stolze*, *supra* at para 9.

11 2003 ABQB 98 (rev'd on other grounds)

12 *Vrana*, *supra* at para 23.

13 *Vrana*, *supra* at paras 24-25.

14 See for example, *Style v. Carlingview Airport Inn*, 1996 O.J. No. 705 (QL) (ON Gen.Div); *Damery v. Matchless Inc.*, 1996 N.S.J. No.229 (NS.S.C.); and *Martellacci v. CFC/INX Ltd.*, 1997 O.J. No.6383 (QL) (ON Gen.Div).

15 2005 ABQB 513

16 *Turner v. Uniglobe Custom Travel Ltd.*, 2005 ABQB 513 at para 50

S. 56 of the Employment Standards Act, 2000, S.O., c.41 reads:

“An employer terminates the employment of an employee for purposes of section 54 *if*,

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.”¹⁶

[*emphasis added*]

17 *Employment Standards Code*, R.S.A. 2000, c. E-9, s.62

s.62 If an employer wishes to maintain an employment relationship without terminating the employment of an employee, the employer may temporarily lay off the employee.

18 *Turner*, *supra* at para 53.

19 *Turner*, *supra* at para 56.

20 2003 BCSC 1345, para. 15

21 [2005] O.J. No.2651 (QL) (ON S.C.)

22 Lederman J. defines ‘Wallace damages’ (para 25): “Wallace damages relate to conduct that is a component of the manner of dismissal. The conduct which must have existed to attract such damages must be something akin to intent, malice or blatant disregard for the employee and could be characterized as callous and insensitive treatment.”

23 2009 BCSC 1316