

Temporary Layoff: A Comparative Review of the Law across British Columbia, Alberta, and Ontario

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I. INTRODUCTION

In a fluctuating economy, an employer may search for ways to cut costs, if it is to survive. One consideration the employer may make is to temporarily layoff some of its employees during the slow period. Layoff, generally speaking, is a practice that temporarily suspends –not terminates– the contract of employment between the employer and the employee without any obligation on the part of the former to provide the employee with advance notice or severance pay. The contractual relationship between the employer and the employee is maintained during the layoff term and there is an expectation that the employee will be recalled when the employer’s business picks up.

While the practice of temporary layoff is not novel, it is not universally well understood by employers and employees alike. Some of this confusion, in part, may be attributed to the interplay between the seemingly simple and straightforward but widely different definitions of temporary layoff in different provincial employment standards legislation and the common law decisions of the court interpreting the legislation. In practice, courts have dramatically limited the use of temporary layoff provisions of some provincial employment standards legislation as a tool for managing employer costs. If temporary layoff is implemented under a misunderstanding of the law of the jurisdiction, it can result in serious unintended consequences, particularly for the employer. In some cases, temporary layoff may be construed as a substantial change in the terms of the employee’s employment contract and amount to constructive dismissal at common law resulting in a liability for wrongful dismissal damages on the employer.

In this article, we intend to provide some clarity on the interplay of the common law and the statutory law regimes governing temporary layoff in a non-union context in three jurisdictions, namely, British Columbia, Alberta and Ontario. In the first part of the article, we will examine the statutory regime governing temporary layoffs in all three provinces by examining the varying definitions of “temporary layoffs” contained in the legislation of each province. In the second part, we will examine the policy considerations, whether general or specific, whether contained within the legislation or in extra-legislative documents, which may inform and govern the practice of temporary layoff in each province. In the third part of the article we will examine some leading decisions of the courts in each province interpreting the intent of the statutes. In the fourth part, we will offer some guidelines for both employers and employees navigating the murky landscape of temporary layoff.

II. WHAT IS TEMPORARY LAYOFF?

The employment standards legislation of British Columbia, Alberta, and Ontario each have varying conceptions of temporary layoff which will impact how this practice is treated by employers and employees alike in each province.

(a) **BRITISH COLUMBIA**

In British Columbia, employment standards are contained within the *Employment Standards Act*ⁱ (“B.C. *ESA*”). The B.C. *ESA* defines "temporary layoff" in section 1 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;

This article is concerned with subparagraph (b) which addresses the non-unionized context of temporary layoff as opposed to subparagraph (a) which is concerned with the unionized context.

In all, the B.C. *ESA* simply provides employers and employees with the limited understanding that temporary layoffs can last up to 13 weeks in a period of 20 consecutive weeks. The definition of “termination of employment” found in the same section makes it clear the temporary layoff is not considered to be a termination:

“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 B.C. *ESA* as granting a right to affect a “temporary layoff” that does not equate to a termination. However, the B.C. *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, which the courts have aimed to do.

Clearly much information and guidance are missing from the legislation which would help inform employers and employees of their rights and obligations. First, there is no mention of whether employees are entitled to pay or any benefits or employment insurance during this period of time, as can arise in Ontario and Alberta, if the employer wants to extend the initial period of temporary layoff. Second, employers and employees are not guided on the proper notice to be given at the time of layoff which is an important consideration in Alberta (as discussed in part IV in greater detail). According to the decision of the Employment Standards Tribunal in *Slumber Lodge Motel Corporation Ltd.*, the B.C. *ESA* does not require the employer to provide the employee a notice of temporary layoff.ⁱⁱ

There is also no express mention in the B.C. *ESA* of extending the temporary layoff, as provided in the employment standards legislation of both Alberta and Ontario. However, under section 72(1)(a) of the B.C. *ESA*, employers and employees may jointly apply for a variance to extend the time period specified in the definition of “temporary layoff” where, for example, the employee will be laid off for a period exceeding 13 weeks, but the employer, still has definite plans to recall the employee by a specific date:

Application for variance

72 An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:

(a) a time period specified in the definition of "temporary layoff"

Lastly, whether or not the temporary layoff period is extended pursuant to a variance, the B.C. *ESA* provides that the effective date of termination is the first day of the layoff, as set out in section 63(5):

63...

(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.

(b) ALBERTA

In Alberta, the provisions regarding "temporary layoff" are found primarily in sections 62, 63, and 64 of the *Employment Standards Code*ⁱⁱⁱ ("Alberta *ESC*"):

Temporary layoff

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.

Termination pay after temporary layoff

63(1) On the 60th consecutive day of temporary layoff, an employee's employment terminates and the employer must pay the employee termination pay on that day.

(2) Subsection (1) does not apply if

- (a) after the layoff starts, and by agreement between the employer and employee, an employer pays the employee wages or an amount instead of wages, in which case the employment terminates and termination pay is payable when the agreement ends;
- (b) the employer makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan or the like, in which case employment terminates and termination pay is payable when the payments cease;
- (c) there is a collective agreement binding the employer and employee containing recall rights for employees following layoff, in which case employment terminates and termination pay is payable when the recall rights expire.

Effect of failure to return to work after recall

64(1) If an employee fails to return to work within 7 consecutive days after being requested to do so in writing by the employer, the employee is not entitled to termination notice or termination pay if the employer decides to terminate the employee's employment as a result of the employee's failure to return to work in accordance with the recall notice.

(2) Subsection (1) does not apply to an employee bound by a collective agreement containing recall rights for employees following a layoff.

The Alberta *ESC*, in section 62, affirmatively grants the employer a right to temporarily layoff its employee. However, temporary layoff cannot exceed 59 days in duration. Pursuant to section 63(1), on the 60th consecutive day of temporary layoff, the employee's employment will be deemed to have terminated and the employer must pay the employee termination pay on that day.

If the employer wants to continue or extend the layoff period past 59 consecutive days, it may do so provided it continues to pay wages or benefits on behalf of the employee.

Section 64 provides that if an employer recalls an employee on a temporary layoff and requests, in writing, the employee to return to work and the latter fails to return to work within the 7 days, the employee is not entitled to termination notice or pay.

There is no mention, in the Alberta *ESC*, of a requirement on the part of the employer to provide the employee a written notice of temporary layoff but the Court of Appeal of Alberta in *Vrana v. Procor Ltd.*^{iv} has delineated some minimum obligations of the employer intending to layoff an employee, which we will discuss in part IV of this paper.

In comparing Alberta's statutory regime governing layoff to British Columbia's, it is fair to conclude that the former is relatively more detailed and clearer than British Columbia's and makes it easier to determine the rights and obligations of the employers and employees in Alberta. It is also clear in reading the pertinent sections of the Alberta *ESC* that the legislation seems to provide the employer more flexibility in the workplace by expressly affording the employer a statutory right to lay off employees.

(c) ONTARIO

In Ontario, the governing legislation is the *Employment Standards Act*^v ("Ontario *ESA*") enshrines the employment standards of that province. Similar to the B.C. *ESA*, the Ontario *ESA* does not expressly grant the employer an affirmative right to temporarily layoff an employee but in section 56(2) defines "temporary lay-off":

Temporary lay-off

(2) For the purpose of clause (1) (c), a temporary layoff is,

- (a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
- (b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
 - (i) the employee continues to receive substantial payments from the employer,
 - (ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
 - (iii) the employee receives supplementary unemployment benefits,
 - (iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
 - (v) the employer recalls the employee within the time approved by the Director, or

(vi) in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

As with its counterparts in Alberta and BC, the Ontario *ESA* does not expressly require the employer to provide a written notice of the layoff to the employee.

As with the B.C. *ESA*, temporary layoffs under the Ontario *ESA* can last up to 13 weeks in a period of 20 consecutive weeks but unlike the B.C. *ESA*, a temporary layoff may be extended by the employer, in its sole discretion, to a maximum of 35 weeks in any 52-week period, if the employer continues to meet certain conditions such as continuing benefit coverage or pension contributions during the temporary layoff.

Should the temporary layoff exceed the time allowed under the legislation, section 56(1) of the Ontario *ESA* deems the employment of the employee to have terminated:

What Constitutes termination

56. (1) 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.

In subsection (4), the Ontario *ESA*, expressly provides that temporary layoff of an employee without a specified recall date is not a termination of employment unless the period of temporary layoff is exceeded:

Temporary lay-off not termination

(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off.

However, once the period of temporary layoff is exceeded, as with the B.C. *ESA*, the Ontario *ESA* makes it clear, in section 56(5), that the termination of the employee's employment is deemed to have occurred on the first day of the layoff:

Deemed termination date

(5) If an employer terminates the employment of an employee under clause (1) (c), the employment shall be deemed to be terminated on the first day of the lay-off.

While the Ontario *ESA* is generally more detailed and specifically more liberal than its British Columbia counterpart as concerns extension of a layoff, on the whole it is as unclear as the B.C.

ESA for failing to specify or indicate whether there exists an affirmative right of the employer to layoff an employee.

III. WHY THE DIFFERENCE? IMPACT OF POLICY CONSIDERATIONS

On the plain language of the legislation in British Columbia, Alberta and Ontario, there are differences and, in some cases, significant differences, on the subject of temporary layoff. While the Alberta *ESC* affirmatively grants the employer a right to layoff an employee, both British Columbia and Ontario's legislation are silent on the subject. As a result, in both British Columbia and Ontario, some employers have been misled into assuming that the legislation in their province provides an "automatic" right to employers to layoff employees for economic reasons. While Alberta's legislation is clearer on the subject of the right to layoff, it is also not without any ambiguity when it comes to implementing a lawful layoff. In all three provinces, more clarity around layoff has come through court decisions interpreting layoff provisions in the respective legislation.

Having said this, where there is any doubt arising from difficulties of language in the employment standards legislation or where the legislation appears to be unclear, courts and tribunals have, sometimes, relied on broad interpretive principles in the legislation, usually delineated in the introductory section and identified as "purposes", to give meaning to the unclear language under consideration. In this part, we will identify the broad interpretive principles of each legislation and any extra-legislative comments such as in the Hansard debates of each province where available, to better understand the scope of the layoff provisions in each provincial legislation.

(a) BRITISH COLUMBIA

Bill 29 was introduced on May 24, 1995 in the provincial legislature by the Minister of Skills, Training and Labour in direct response to the first comprehensive review of employment standards in British Columbia and included many of the changes recommended by Professor Mark Thompson in his report *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* (the "Report"). While the Report referred to the definition of temporary layoff in the B.C. *ESA* and went so far as to state that "[t]here are special problems with layoffs", it did not make any recommendations or suggest any material changes or amendments to the existing legislation to provide greater clarity for employers and employees around the layoff practice in the non-union context in British Columbia. However, the Report did note that the legislation did not contain a statement of purpose which is necessary for employment standards legislation as "it is to be read and used by many persons who lack legal training" and it would also assist the courts and tribunals in interpreting the legislation. As a result, the proposed statement of purpose in the Report found its way in the Bill and now forms part of the current B.C. *ESA* and is found in section 2:

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.

The big ideals to take away from this section are that the British Columbia government sought to emphasize a need for minimum standards of employment, fairness, open communication, efficiency, and flexibility in the work-life balance. Unfortunately, the “Purposes” provision does little to give any guidance to the employers and employees around the layoff practice in British Columbia. Arguably, the lack of clarity around the layoff practice in the B.C. *ESA* counterintuitive to the stated purpose in section 2(b), namely, the promotion of fair treatment of employees and employers.

(b) ALBERTA

In the Alberta *ESC* the policy considerations for the provisions in the legislation can be found in the preamble of the legislation which provides:

Preamble

RECOGNIZING that a mutually effective relationship between employees and employers is critical to the capacity of Albertans to prosper in the competitive world-wide market economy of which Alberta is a part;

ACKNOWLEDGING that it is fitting that the worth and dignity of all Albertans be recognized by the Legislature of Alberta through legislation that encourages fair and equitable resolution of matters arising over terms and conditions of employment;

REALIZING that the employee-employer relationship is based on a common interest in the success of the employing organization, best recognized through open and honest communication between affected parties;

RECOGNIZING that employees and employers are best able to manage their affairs when statutory rights and responsibilities are clearly established and understood; and

RECOGNIZING that legislation is an appropriate means of establishing minimum standards for terms and conditions of employment;

A preamble in a statute is treated as part of the legislation itself and may be an aid to interpretation, if a provision of the legislation under consideration is ambiguous or unclear. The preamble in the Alberta *ESC* has been considered by the courts in Alberta regarding temporary layoff and what requirements the employer must satisfy, as discussed in the next part of the article.^{vi}

In reviewing the preamble of the Alberta *ESC*, the provincial government sought to value, among other things, open communication, minimum standards of employment, and easily identifiable statutory rights and responsibilities and the competitive world-wide market economy of which Alberta is a part. The reference in the preamble to the “world-wide market economy of which Alberta is a part”, arguably, speaks to the uncertain oil-based economy of Alberta (which in recent times has suffered tremendously with the protracted and continuing global oil slump) and foreshadows the relatively liberal or pro-employer stance on layoff in the legislation.

(c) ONTARIO

Unlike the British Columbia and Alberta legislation, there is no broad policy statement in the Ontario *ESA* to guide the public as to the underlying spirit of the legislation. However, in reviewing transcripts of the debates and publications on the subject, it is possible to determine what the underlying policy consideration would be. In broad terms, at the heart of the legislation was a desire to introduce flexibility to the workplace. As was briefly stated during the introduction of Bill 147 into the Legislature, the Ontario *ESA* “provides employers and employees with the flexibility to design working arrangements to fit their needs.”^{vii}

Certainly, having more flexibility and fairness in the workplace would be beneficial to both employers and employees. During the readings of Bill 147, the opposition party was highly critical of the decidedly pro-employer stance of the proposed legislation and viewed it as “simply a gift, a Christmas gift, to big business” and “the most regressive anti-working-people legislation in the history of Ontario”.^{viii}

After reviewing the policy considerations which mark each employment standards statute, the question that remains to be asked is what accounts for the difference between the statutes and their treatment of temporary layoff. On the face of the statutes, there does not appear to be much policy difference. The purposes of each statute, whether expressed in the text of the legislation or through extra-legislative pronouncements, tend to value fairness, efficiency, open communication, and flexibility. This does not decidedly explain the stark difference in the legislative treatment of layoff between the Alberta *ESC* on the one hand and the B.C. *ESA* and the Ontario *ESA* on the other hand. It may very well be that the difference in the legislative treatment of layoff in these provinces is based simply on the nature of their economies. That is, the legislatures of the more diversified economies of British Columbia and Ontario may not see the need to affirmatively provide employers the same flexibility to layoff employees as their counterpart in Alberta, a province that is undiversified and economically over dependent on oil and subject to greater shocks to its economy with the vagaries of the global oil prices.^{ix}

IV. INTENT OF STATUTES AS DETERMINED BY THE COURTS

As indicated above, the employer and the employee cannot strictly look to the statutory regime to determine their rights governing the practice of temporary layoff. Statute only provides a part of the picture in each jurisdiction while common law plays a significant role in completing that picture. More particularly, the courts in each province have stepped in to help clarify the practice of temporary layoff including but not limited to defining whether there is a statutory right of the employer to layoff an employee; what, if any, notice is required to be given to the employee when affecting a layoff; what pay or benefits, if any, should the laid off employee expect; and whether there is any duty to mitigate on the part of the laid off employee during the period of the temporary layoff. In this part, therefore, we will examine some instructive court decisions in each province.

(a) **BRITISH COLUMBIA – COLLINS (1995) AND BESSE (2009)**

The leading case in British Columbia on temporary layoff is *Collins v. Jim Pattison Ltd.*^x 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 poor 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-week layoff 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 B.C. *ESA* recognize a distinction between termination and temporary layoffs and there was no longer a requirement for a contractual right to layoff, as long as the layoff was *bona fide* and does not exceed 13 weeks. The plaintiff argued that had the legislature intended to grant such a right, it would have done so expressly. In siding with the plaintiff, the court reasoned:

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 [41, 42, and 44] of the *Act* are not relevant.^{xi}

The *Collins* decision solidified British Columbia's position that the B.C. *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 subsequent cases on the subject in British Columbia and frequently also considered in court decisions of other provinces on the subject.

More recently in *Besse v. Dr. A.S. Machner Inc.*^{xii}, we see yet another example of an employer misunderstanding the temporary layoff provision in the B.C. *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, a receptionist, reduced hours but she refused. Relying on the B.C. *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:

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.^{xiii}

The *Besse* decision shows that the unclear language of the B.C. *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 B.C. *ESA*, have mistakenly accepted temporary layoffs believing the language of the legislation permits employers the right to layoff temporarily.

Following the decision in *Besse*, in November 2009, the Employment Standards Branch published a factsheet on termination of employment which helped to clarify the right to temporary layoff^{xiv}:

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.

Collins and *Besse* demonstrate the importance of an express provision in the employment contract permitting the right to temporary layoff. In British Columbia, where the right to temporary layoff is not found in the employment contract, the common law regime will prevail and the employee will be able to claim constructive dismissal.

Since the *Collins* and *Besse* decisions, the British Columbia Supreme Court has had further opportunities to examine and provide clarification on temporary layoffs. Most decisions tend to uphold the reasons adopted in *Collins* and *Besse*, such as in *Hooge v. Gillwood Remanufacturing Inc.*^{xv} and *Logan v. Numbers Cabaret Ltd. (Hamburger Mary’s)*^{xvi}. In *Thru Windo Cleaners Inc. v. Mahood*,^{xvii} the court clarified that “unless such a term is expressly agreed to or clearly impliedly agreed to, consistent with the definition of the *Employment Standards Act*, a termination can be considered to have occurred upon a layoff of over 13 weeks for an employee without a right of recall.^{xviii} Though the British Columbia Supreme Court has been consistent in applying its approach to temporary layoffs, the Employment Standards Tribunal has not. In earlier decisions, the Tribunal found that an employer has a right under the B.C. *ESA* to unilaterally layoff an employee and that temporary layoff will become a deemed termination when the layoff period exceeds 13 weeks.^{xix} However, in a more recent decision, the Tribunal seems to be adopting the reasoning of the Court in *Collins* and *Besse* in finding that temporary layoff is a fundamental breach of the employment contract if there is no express or implied term.^{xx}

(b) ALBERTA – *VRANA* (2004) AND *TURNER* (2005)

In Alberta, the decision of the Court of Appeal in *Vrana v. Procor Limited*^{xxi} helped clarify the practice of temporary layoff in Alberta. The plaintiff was employed by the defendant for 16 years. Due to shortage of work, the plaintiff was laid off. Rather than waiting out the 59 days of temporary layoff, the plaintiff brought a wrongful dismissal claim against the defendant during the temporary layoff. The defendant argued that the plaintiff was not entitled to file such a claim until after the expiration of the 60-day period referred to in s.63(1) of the Alberta *ESA*. At trial, the court sided with the defendant, reasoning as follows:

[23] I am of the view that s. 62 of the *Employment Standards Code* has created a new right for employers in Alberta. The plain and express language of s. 62 entitles an employer who wishes to maintain an employment relationship to temporarily lay off the employee. The length of the temporary layoff is subject to the terms contained in ss. 63 and 64. The effect of s. 62 is to suspend or delay the use of a common-law right until the occurrence of certain events, (i.e., for at least 60 days (s. 63(1)), or sooner, in the event of a failure to return to work after recall (s. 64(1)). Therefore, where at common law an action for wrongful dismissal could be commenced immediately upon getting notice of a layoff (where there is no express or implied term of the contract of employment permitting a temporary layoff without pay), s. 62 prevents the commencement of an action until such time as the time lines in s. 63 or s. 64 have been reached. An action by an employee for wrongful dismissal cannot be commenced until after the expiration of the time lines in either s. 63 or s. 64 because, pursuant to s. 62, there continues to exist an employer-employee relationship even though the employee is temporarily laid off.^{xxii}

In its holding, the trial court remarked that there existed a potential for abuse of the system by an employer who may recall an employee on the 59th day after layoff, and have the employee work for a few days and then again layoff of the employee and engage in this pattern of layoff indefinitely, however, notwithstanding this potential, “the language [of the statute is] clear, explicit, and unambiguous.”^{xxiii}

The employee appealed the trial decision. In its decision, the Court of Appeal chose not to make a determination on whether the Alberta *ESC* protected an employer from a claim of constructive dismissal prior to the expiration of the 59 days but instead, chose to focus on the content of the Defendant’s temporary layoff notice to the Plaintiff:

We have concluded that there is another basis on which this appeal should be allowed. It relates to the content of Procor’s notice of temporary layoff.... [W]e have concluded that, at a minimum, the potentially negative consequences of a temporary layoff demand that when an employer elects to exercise its rights under s.62, it should provide a fair notice to the employee of its intention to do so. To comport with the spirit and intent of the *Code* and to ensure that the employee is properly advised of the employer’s intentions, 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, that is ss.62, 63 and 64.^{xxiv}

According to the Court of Appeal, the employer should, at a minimum, be obligated to give notice to the employee setting out the following: (1) the fact of temporary layoff; (2) the effective date of temporary layoff; and (3) sections 62, 63, and 64 of the *ESC*. Notice of temporary layoff was seen

to aid in the power imbalance of the employment relationship and to assist in “ensuring that there is no misunderstanding between employer and employee as to the respective rights and obligations” and “avoid the employer’s lulling an employee into a situation where the employee believes that he or she has been constructively dismissed”. In this case, the Court of Appeal found that the employer failed to provide sufficient notice to the employee prior to the layoff and reversed the trial decision and allowed the employee to bring an action for constructive dismissal against the employer.

While the Court of Appeal in *Vrana* decided the outcome of the case on the basis of inadequate notice and chose not to resolve the question of whether or not the Alberta *ESC* preserves the right of an employee to treat a temporary layoff as constructive dismissal, the trial court, in a subsequent decision, in *Turner v. Uniglobe Custom Travel Ltd.*^{xxv} chose to deal with the latter question.

In *Turner*, the employers were in the travel business and employed the plaintiff as a manager of finance for about 15 ½ years. After the 9/11 catastrophe in New York, the employers provided the plaintiff with a letter advising that her employment would be terminated effective immediately. The letter also advised that if “volumes recovered”, she would be recalled to work “within 60 days”. The Plaintiff, in response, handed the employer her letter which, among other things, set out her understanding that her employment was terminated and she expected severance and vacation pay. Approximately two weeks later, the Plaintiff’s lawyer served the employer with a demand letter which the employer did not respond to. About two weeks later, and approximately 30 days into the layoff period, the employer sent the plaintiff a letter advising that the employer “has the ability to recall you within 59 days” and it had made a few attempts to call her to ask her to come back to work as her “temporary layoff is over” and her employment will “commence on November 5, 2001”. The trial court reviewed the Court of Appeal’s decision in *Vrana* and found the notice of layoff the employer issued in this case was equally inadequate and then went further to address the unresolved question in *Vrana* of whether an employee’s common law right to treat a layoff as a termination was preserved by section 3 of the Alberta *ESC* which provides that nothing in Alberta *ESC* affects any civil remedy of an employee or an employer. In concluding that section 3 of the Alberta *ESC* preserves the Plaintiff’s common law right to treat her layoff as a termination, the trial court observed that in other Canadian jurisdictions, particularly, Ontario and British Columbia, courts have tended to favour interpretations which preserve the common law right of an employee to treat a layoff as a termination and reasoned as follows:

[54] An interpretation of the *Code* that preserves the common law right of an employee to treat a layoff as a termination also prevents the type of scenario contemplated by Fraser C.J.A. in the Court of Appeal’s decision in *Vrana*. Fraser C.J.A. wrote that if Ouellette J.’s interpretation was correct, an employee could be caught in a revolving door layoff scenario where he or she was repeatedly laid off, recalled for a short amount of time, and then laid off again. Ouellette J. also acknowledged that the provisions could be abused (at para. 24).

[55] I am bolstered in my opinion that an employee’s common law right to treat a layoff as a termination is preserved by the Supreme Court of Canada’s decision in *Rizzo & Rizzo Shoes Ltd., Re, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27*. Referring to the *Employment Standards Act* of Ontario, which is similar to the *Code*, Iacobucci J. wrote that

. . . . 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 (at para. 36).

As the law currently stands in Alberta, the Court of Appeal's decision in *Vrana* has delineated in express terms the three minimum requirements for notice of temporary layoff referred to above while the trial court in *Turner* has expressly recognized that Alberta *ESC* preserves the common law right of an employee to treat a layoff as a termination. However, the *Turner* decision has not been considered by the Appeal Court of the province or other courts as at the writing of this article. It is likely that the issue of whether or not the Alberta *ESC* protects an employer from a claim of constructive dismissal will be re-examined in Alberta, in higher courts, at some point in the future.

(c) ONTARIO – *ELSEGOOD (2011), TRITES (2013) AND BEVILACQUA (2016)*

In Ontario, the Court of Appeal decision in *Elsegood v. Cambridge Spring Service*^{xxvi} confirmed that temporary layoff, in the province of Ontario, is constructive dismissal where the right was not provided in the employment contract.^{xxvii}

In this case, Mr. Elsegood, a technician, had been in the employer's employ for seven years. The parties' employment relationship was not governed by a written employment contract. In April 2009, Mr. Elsegood was laid off by the employer for the first time, and then recalled back in June 2009. He was again laid off in July 2009. During the layoff period the employer continued to pay Mr. Elsegood the employer portion of benefits. In January 2010, when the cumulative duration of the layoffs reached 35 weeks within a 52-week period constituting termination under s. 56(1) of the Ontario *ESA*, Mr. Elsegood brought a claim for common law damages for wrongful dismissal in the Small Claims Court. The Court awarded Mr. Elsegood damages reflecting a notice period of 6 months.

The employer appealed the trial decision to the Ontario Superior Court of Justice, which dismissed the appeal. On further appeal to the Court of Appeal, the employer argued that common law and Ontario *ESA* are separate regimes. The employer asserted that it did not terminate Mr. Elsegood's employment under the common law; his termination was only for statutory purposes. Therefore, Mr. Elsegood's entitlement under the Ontario *ESA* was all that was owed, which he had already been paid. The Court of Appeal found the employer's argument untenable stating that an employee's employment status cannot survive the termination of that status through a valid enactment of the legislature:

[5] In my view, s. 56(1) of the *ESA* operates to terminate an employee's employment in law so that the employee may claim for common law wrongful dismissal damages. I reach this conclusion in two ways. First, I do not accept the employer's premise that the *ESA* and common law operate as two independent regimes. I conclude that an employee's employment status simply does not survive termination by a valid enactment of the legislature. Second, accepting the employer's premise for the sake of argument, an

employee laid off for more than 35 weeks in a 52- week period would be able, in every case, to claim constructive dismissal at common law...

A s. 56(1) termination is a termination for all purposes.

[6] I do not accept the employer's premise that an employee's employment status survives a statutory termination by the ESA. Simply put, statutes enacted by the legislature displace the common law.^{xxviii}

Based on the foregoing reasons of the Court of Appeal, at the very latest, the employment contract ends under both the Ontario *ESA* and at common law when temporary layoff becomes a dismissal under s. 56(1) of the Ontario *ESA*.

However, the Court of Appeal went further in *Elsegood* to establish that, absent a contractual right of the employer to layoff, the contract may also come to an end sooner than that under the common law, if the employee elects to treat the layoff as a dismissal when it is implemented:

[14] At common law, an employer has no right to lay off an employee. Absent an agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and would be a constructive dismissal.^{xxix}

However, in a subsequent decision of the Ontario Superior Court of justice in *Trites v. Renin Corp.*^{xxx}, the Court granted greater flexibility to employers in implementing temporary layoffs in the workforce to deal with financial difficulties. Briefly, in this case, Ms. Trites was employed as a financial controller. As in the case of the employee in *Elsegood*, Ms. Trites did not have a written contract of employment with her employer but she was entitled to participate in the employer's group medical, dental and long-term disability benefits plans. When the employer underwent financial difficulties, it instituted various cost cutting measures including temporarily laying off employees under the Ontario *ESA*. In implementing layoffs, the employer was very careful and implemented rolling layoffs tracking the timing of each layoff to avoid a deemed termination under the Ontario *ESA*. Ms. Trites was one of many employees selected by the employer to be laid off. She was not given an advance of layoff. On November 15, 2012, she was called into a meeting with the employer's Human Resources manager and given a letter and a consent document and advised that she was being laid off. The employer stopped paying her salary and discontinued her long-term benefits immediately. The employer also stopped making contributions to the Canada Pension plan on Ms. Trites' behalf. She was copied an Employment Insurance Record which advised Service Canada that she was laid off without any indication whether the layoff was a temporary measure.

Ms. Trites declined to sign the consent document of the employer that indicated, among other things, her agreement to be laid off for a period of up to 35 weeks. Subsequently, Ms. Trites sued the employer for constructive dismissal. She argued that temporary layoff provisions of the Ontario *ESA* operate separately from her common law rights and are intended to provide employees protection where layoffs are otherwise permitted as an express term of the employment contract by limiting the temporary layoffs to the maximum time periods. She relied on the Ontario Supreme Court decision in *Martellacci v. CFC/INX*^{xxxi} to argue that a temporary layoff under the legislation cannot be affected without the agreement providing the employer a right to layoff.

In light of the decision in *Elsegood*, one would have thought that the court in *Trites* would have found in favour of the employee on the basis of constructive dismissal due to the absence of an employment contract. Interestingly, the court found that “there is no room remaining at law for a common law claim for a finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the ESA.”^{xxxii} The court, however, did not treat the layoff as a temporary layoff under the Ontario *ESA* only because the employer did not follow the requirements of s. 56(2). That is, the employer did not continue to provide Ms. Trites substantial payments or supplementary unemployment benefits or offer ongoing entitlement to medical or dental benefits:

[35] In the instant case, Renin has not actively dismissed Ms. Trites and has not established that it is unable to continue employing her, quite the contrary. Nor has Renin purported to lay Ms. Trites off for a period longer than the period of the temporary layoff. The question remains, however, has Renin constructively dismissed Ms. Trites and has she resigned from her employment in response to that within a reasonable period?

[36] In my view, Ms. Trites was not placed on a temporary layoff within the meaning of the *ESA*. Although the layoff did not involve a period of 35 weeks or more, Ms. Trites did not continue to receive substantial payments from Renin and/or supplementary unemployment benefits. She was not offered ongoing entitlement to medical or dental benefits as a term of layoff. Renin has failed to bring its proposed layoff protocol in this case within the ambit of the definition of temporary layoff in the *ESA*.

[37] In the result, I find that Renin constructively dismissed Ms. Trites by so dramatically and unilaterally changing the terms of her employment on November 15, 2011.

The *Trites* decision was criticized by the Ontario Superior Court of Justice in two subsequent decisions. In *Janice Wiens v. Davert Tools Inc.*^{xxxiii}, the court stated:

[140] The plaintiff and defendant disagree with the law. The defendant submits that *Trites v. Renin Corp.* ... where the court states at paragraph 29:

[141] “there is no room remaining at law for a common law ... finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the *ESA*”

[142] The plaintiff argues that this statement of Justice Moore is obiter and the existing case law. In my view the statement is obiter and not consistent with the higher courts.

In *Michalski v. Cima Canada Inc.*^{xxxiv} the court stated:

[23] The defendant relies on the decision of Moore J. in *Trites v Renin Corp.* ... where he says “in my view, there is no room remaining at law for a common law claim for a finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the *ESA* (paragraph 29). It appears to me that the *Trites* decision is out of step with the weight of the prior authorities previously referred to. To the extent that the decision of Moore J. in *Trites* stands for the proposition that the

common law conditions precedent to a lawful layoff have been completely displaced by the [ESA](#), I respectfully disagree.

More recently, in *Bevilacqua v. Gracious Living Corporation*^{xxxv}, the Ontario Superior Court of Justice, following the decision of the Court of Appeal in *Elsegood, supra*, confirmed that, in the absence of a contractual right to layoff, the fact that a layoff may be conducted in accordance with the requirements of the Ontario *ESA* is not determinative of the question of whether the layoff is a constructive dismissal. In *Bevilacqua*, the employee, a 15-year facilities manager, was informed by his employer on September 15, 2014, that he was being temporarily laid off, and that he would be recalled in three months. During his period of layoff, the employer kept the employee on his company benefits and let him keep his company cell phone. While the layoff was implemented in accordance with the requirements of the Ontario *ESA*, the employee immediately took the position that his employment had been terminated when he was placed on layoff, as there was no term in his contract of employment that permitted the employer to temporarily lay him off. The Court agreed with the employee stating that absent a provision in his contract of employment allowing for a temporary layoff, a unilateral layoff constituted a constructive dismissal, regardless of whether it was done in compliance with the Ontario *ESA*:

[9] The Ontario Court of Appeal has held that a unilateral layoff by an employer is, absent agreement to the contrary, a substantial change in employment, and that it therefore constitutes a constructive dismissal: *Elsegood v Cambridge Spring Service*, 2011 ONCA 831 (CanLII), at para 14. An employer has no right to impose a layoff either by statute or common law, unless that right is specifically agreed upon in the contract of employment. The fact that a layoff may be conducted in accordance with the *Employment Standards Act, 2000*, SO 2000, c. 41, is irrelevant to the question of whether it is a constructive dismissal. Gracious Living was not legally authorized to “simply place [Mr. Bevilacqua’s] employment status on hold without pay and expect that this will not constitute a constructive dismissal”: *Martellacci v CFC/INX Ltd* (1997), 1997 CanLII 12327 (ON SC), 28 CCEL (2d) 75, at para 30 (Gen Div).^{xxxvi}

Having concluded the employee was constructively dismissed, the Court went on to consider his entitlement to damages. The employee was unemployed for 15 months before finding alternative employment. The Court noted that six weeks into his layoff, the employer asked the employee to return to work but he refused, although he was on friendly terms with his employer over the years. The employee’s refusal was because he had determined that he was not going back to work no matter what, as he had already decided to sue. The Court also observed that the employee did not make a concerted effort at finding a job. He failed to send out his résumé and did not apply to a single job. In the circumstances, the court found that, rather than the 15 months’ salary in lieu of notice sought, the employee was only entitled to 3 months because of his failure to mitigate his damages:

[26] Mr. Bevilacqua was not rejected by Gracious Living. As far as Gracious Living understood, he was temporarily laid off, albeit in circumstances where Gracious Living was not entitled to do so. There was nothing either in law or in interpersonal relations with his employer that prevented him from accepting the offer to return.

[27] Gracious Living constructively dismissed Mr. Bevilacqua on September 15, 2014. It offered him his old job back on November 5, 2014, to begin work on December 15, 2014. Mr. Bevilacqua is entitled to pay in lieu of notice for the three months that he would have been out of

work had he mitigated his damages by accepting Gracious Living's offer. Since he kept all of his employment benefits during that time, he is entitled to his salary alone....

In summary, in Ontario, while the court in *Trites* came to the opposite conclusion holding that "there is no room remaining at law for a common law claim for a finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the *ESA*", subsequent decisions of the same court have confirmed that, in the absence of a contractual right to lay-off, the fact that a layoff may be conducted in accordance with the requirements of employment standards legislation is not determinative of the question of whether it is a constructive dismissal. Also bolstering the authority of the decisions that undermine the authority of *Trites* is the Ontario Court of Appeal's decision, in 2015, in *Motion Industries (Canada) Inc. v. McCarthy*. While the Appeal Court in *McCarthy* did not directly reject *Trites* or the disputed language in *Trites*, it considered and rejected the employer's submission that the effect of section 56(4) of the *Ontario ESA* (Temporary lay-off not termination) is that an employer can only terminate an employee on temporary layoff through the expiry of the layoff period. In other words, the employer was arguing that the provision in question ousts the application of the common law doctrine of constructive dismissal during the temporary layoff period. The Court of Appeal stated "we are unable to accept the proposition that the language of section 56(4) is capable of excluding the possibility of constructive dismissal." In the circumstances, the authority of *Trites* is suspect.

(d) SUPREME COURT OF CANADA –*POTTER* (2015)

In the landmark decision on constructive dismissal in *Farber v. Royal Trust Co.*^{xxxvii}, the Supreme Court of Canada stated "where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed."^{xxxviii}

Almost two decades later, in *Potter v. New Brunswick Legal Aid Services Commission*^{xxxix}, the Supreme Court had a chance to revisit the law on constructive dismissal and clarify and reformulate it.

While *Potter* involves an administrative suspension relating to the actions of the plaintiff himself and not a layoff by the employer for economic reasons, the Court's analysis of the law governing constructive dismissal and instructive comments bear consideration as they will no doubt inform the ever-evolving landscape of layoff in Canada.

In *Potter*, the plaintiff employee was appointed the Executive Director of the New Brunswick Legal Aid Services Commission for a seven year term. About half-way into the term, the plaintiff and the defendant began negotiating for a buyout of the plaintiff's employment contract. However, prior to the conclusion of these negotiations, the plaintiff delegated his responsibilities to another director and went on medical leave.

Following this, the defendant unilaterally decided to put a deadline on the buyout negotiations. If the negotiations were not resolved prior to a certain date, the defendant's plan was to make a

request to the Lieutenant-Governor in Council to revoke the plaintiff's appointment for cause. A week before the plaintiff was scheduled to return from medical leave and unbeknownst to the plaintiff, a letter was sent to the Minister of Justice by a representative of the defendant requesting that he be dismissed for cause. On the same day, the defendant's solicitor sent the plaintiff's solicitor a letter which effectively placed the plaintiff on an indefinite administrative suspension without any explanation, but with pay. Meanwhile, the defendant designated a replacement for the plaintiff. Two months after being suspended, the plaintiff commenced an action for constructive dismissal. The defendant contended that by commencing the action the plaintiff had voluntarily resigned, and stopped paying his salary and benefits.

While the plaintiff was unsuccessful in the trial and appeal courts, he succeeded at the Supreme Court. Wagner J., who wrote the main judgment of the Court, delineated two branches of the test for constructive dismissal. First, the employee may demonstrate that the employer breached an express or implied term of the contract and then show that the breach was serious enough to constitute constructive dismissal.^{xi} The majority explained that a sufficiently serious breach is one which "substantially alters an essential term of the contract" or evinces an intention on the part of the employer to no longer be bound by the contract^{xii}. As explained previously by the Court in *Farber*, this involves asking the question whether a reasonable person in the same situation as the employee would feel that the essential terms of the contract were altered.^{xlii}

Under the second branch, the employee may prove more generally that the employer intended not to be bound by the employment contract, even without showing that there was a breach of a specific term.^{xliii} This branch takes a retrospective look at whether the employer's cumulative past acts evince an intention to no longer be bound by the contract.^{xliv} The question under this branch is whether a reasonable person in the position of the employee, in light of all the circumstances, would conclude that the employer no longer intended to be bound by the contract.^{xlv}

The majority analyzed the facts in *Potter* using the first branch of the test for constructive dismissal and held that the defendant had in fact constructively dismissed the plaintiff. More particularly, under the first step, the majority found the defendant did not have express or implied authority to suspend the plaintiff. The reasons for this finding included the fact that the suspension was of indefinite duration, the defendant had failed to act in good faith, and that it had concealed the intention to have the plaintiff's employment terminated.^{xlvi} The majority pointed out that as the analysis under this step was conducted from an objective point of view, it was appropriate to consider the letter sent on behalf of the defendant to the Minister of Justice requesting the plaintiff's dismissal.

The majority further accepted, under the second step, that a reasonable person in the position of the plaintiff would view the breach as substantial, despite the fact the defendant continued to pay the plaintiff. The defendant had a duty to provide the plaintiff with work, and the suspension was neither reasonable nor justified, since no reasons were provided to the plaintiff.^{xlvii} However, the majority emphasized that at this point in the test, it was not appropriate to consider the letter requesting the plaintiff's dismissal, because it was completely outside the realm of the plaintiff's knowledge at the time.^{xlviii}

Some noteworthy passages in the decision of the majority that are instructive and may apply in context of administrative suspension for economic reasons are the following:

[83] Work is now considered to be “one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being” (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). Thus, it is clear that the benefits derived from performing work are not limited to monetary and reputational benefits....

[84] ... Even at common law, where the employer is not under a general obligation to provide work, the employer may not withhold work in bad faith or without justification. It may reduce an employee’s workload or abolish his or her position for legitimate business reasons, as was done in *Suleman*, in which the employee’s workload was reduced pending her termination owing to a shortage of work. However, I reject the proposition that an employer can refuse to provide work to an employee to whom the exceptions discussed above do not apply — let alone suspend and replace such an employee — for just any reason. That would undermine the non-monetary benefit all workers may in fact derive from the performance of their work. It would also be inconsistent with the employer’s duty of good faith and fair dealing that has been gaining acceptance at common law: see D. J. Doorey, “Employer ‘Bullying’: Implied Duties of Fair Dealing in Canadian Employment Contracts” (2005), 30 *Queen’s L.J.* 500.

...

[98] In my view, legitimate business reasons constitute a requirement for a finding that an administrative suspension based on an implied authority to suspend is not wrongful. Other than in the context of a disciplinary suspension, an employer does not, as a matter of law, have an implied authority to suspend an employee without such reasons. Legitimate business reasons must always be shown, although the nature or the importance of those reasons will vary with the circumstances of the suspension.

There are a number of important takeaways from *Potter*, namely:

1. Where an action is not expressly authorized by the employment contract, a careful analysis should be conducted as to whether the action is impliedly authorized or consented to by the employee – if not, the employer runs the risk of having constructively dismissed the employee.
2. *Legitimate business reasons*: Employers do not have the implied authority to place an employee on non-disciplinary administrative suspension without legitimate business reasons. If the employer desires to have this ability, it should be provided in the contract.
3. *Continuing to pay is insufficient*: There is a duty for employers to continue to provide work. When this duty is interfered with, continuing to pay the employee may be insufficient to show that the employee was not constructively dismissed.

While the full interplay of the principles in *Potter* and temporary layoff practice will require some time to play out in lower courts, it is advisable that employers intending to institute an administrative suspension for economic reasons (temporary layoff), even where an implied or express power under the contract to suspend an employee is found, should communicate to their

employees some sound business reasons – economic hardship, downturn in business or the like – for their decision to suspend.

V. CONSEQUENCES OF TEMPORARY LAYOFF

Based on the foregoing discussion on the employment standards legislation in British Columbia, Alberta, and Ontario, it is possible to pinpoint certain pitfalls for both the employer and the employee and to provide guidance through the murky landscape of temporary layoff.

(a) GUIDANCE FOR EMPLOYERS

As was hopefully demonstrated in this article, employers must be wary of utilizing the practice of temporary layoff. If not careful, employers could face claims from employees of constructive dismissal and face increased damages and costs for their mistakes. As an aid for employers, here are a few tips in order to safely navigate the temporary layoff terrain.

First, if the employer wants to preserve its ability to impose temporary layoffs, it should, at the time of hire, include a provision in the employment contract that affords the employer this right. This is particularly advisable for employers in British Columbia and Ontario where the employment standards legislation does not affirmatively provide the employer a right to temporarily layoff its employees.

In the case of Alberta, although the Alberta *ESC* provides an affirmative right to layoff, the trial court in *Turner* has expressly recognized that the legislation preserves the common law right of an employee to treat a layoff as a termination. While the *Turner* decision has not been considered by the Appeal Court of the province as at the writing of this article, it is likely that the issue of whether or not the Alberta *ESC* protects an employer from a claim of constructive dismissal will be re-examined in Alberta at some point in the future. In the meanwhile, out of abundance of caution, it is advisable that Alberta employers desiring to preserve their ability to impose temporary layoffs do so expressly, at the time of hiring, in employment contracts.

Another option is for the employer to reference the possibility of temporary layoff in employee handbooks and workplace policies which should be incorporated, by express reference, in the employment contract. These measures will ensure that the employee understands that there is a possibility of temporary layoff and that the relevant employment standards legislation applies.

However, where the employment contract does not afford the employer the right to impose temporary layoffs, the employer should consider approaching the employee with a view to obtaining the employee's written consent to a temporary layoff. An employment contract may be changed, even significantly, if the employee consents to it. Having said this, it is submitted that many an employee will agree to a temporary layoff rather than risk termination of employment.

Second, for all jurisdictions, when drafting terms to include in the employment contract or workplace policy regarding temporary layoff, do not stray from the time periods allowed under the employment standards legislation. For example, in British Columbia, the term should not allow for the employee to be laid off for more than 13 weeks in the 20 consecutive weeks' period;

otherwise, the employer will be in non-compliance with the legislation. The statute should inform the specific provisions regarding temporary layoff.

Third, it would be good practice to include the following information in the employer's notice of temporary layoff: (i) the effective date of the temporary layoff; (ii) sound business reasons for the layoff (iii) the applicable provisions from the employment standards legislation; and (iv) any direction to the fact sheets on temporary layoff, if available from the relevant employment standards branch or board in the province. Though this recommendation is mostly applicable to the Alberta employment law regime, it is also advisable for employers in British Columbia and Ontario to adhere to these recommendations as this will allow the employer to demonstrate that they have fully and fairly informed the employee of their respective rights and obligations during the period of temporary layoff. It may also be helpful to the employer in keeping a record of the temporary layoff period and period for recall.

Lastly, if the employment standards legislation requires that the employee continue to receive substantial payments, benefits, or supplementary unemployment benefits during the temporary layoff period, it would be advisable to continue to provide such contributions. Certainly, in Alberta and Ontario, the payment of employee wages and employee's pension and benefits contribution will allow the employer, pursuant to terms of the employment standards legislation in these provinces, to extend the initial temporary layoff timeframe by a further period. The *B.C. ESA*, however, does not provide for such benefits to be paid and the extension of temporary layoff in BC requires the employer and the employee to make a joint written application to vary the time period specified in the definition of 'temporary layoff'.

(b) GUIDANCE FOR EMPLOYEES

Understandably, temporary layoff, as a practice, is more beneficial to the employer. As was seen with the legislation in all three provinces considered here, employers have certain, albeit limited, rights and obligations tied to the use of temporary layoff. Therefore, much of the emphasis in this area of employment law is focused on the employer. However, there are pitfalls that the employee should be aware of in order to have their rights maintained to the fullest.

First, employees should always read the employment contract and the workplace policies to instruct themselves whether their employer has a contractual right to lay them off. In Alberta, it remains to be seen whether an affirmative right to layoff in the Alberta *ESC* obviates the need for an employer to preserve in the written employment contract its ability to impose temporary layoffs.

Second, where the contract permits the employer to temporarily layoff, the employee should make sure to be aware of the maximum time period a lay off can last under the employment standards legislation, and what obligations the employer has to the employee during the layoff itself - payment of any benefits such as pension or insurance payment.

Relatedly, the employee should make sure the employer is following any other rules regarding notice as set out in the relevant legislation or at common law. For example, in Alberta, the Court of Appeal in *Vrana* requires the employer, at a minimum, to give notice to the employee setting out the following: (1) the fact of temporary layoff; (2) the effective date of temporary layoff; and

(3) sections 62, 63, and 64 of the *ESC*. The Supreme Court of Canada's decision in *Potter* may also require, in all provinces, that employers communicate to the employees its business reasons – economic hardship, downturn in business or the like – for their decision to suspend or temporarily layoff. In the circumstances, where the employer has not provided any reasons for the temporary layoff, the employee may want to request reasons.

Third, the employee must be aware that their refusal of the recall to work may complicate matters when it comes to assessing damages. As was seen in the Ontario case, *Bevilacqua*, the employee refused to be recalled to work after three months, opting instead to treat the temporary layoff as termination under the common law. The employee did not make much of an effort to relieve his duty to mitigate and there was no reason why he could not accept to go back to work in the same position, at the same pay, and at the same hours where his relationship with the employer was not frayed. The employee was only awarded three months of termination pay as opposed to the fifteen months claimed.

In the case of laid off employees in Alberta, they should be mindful that the Alberta *ESC* expressly provides that a failure of the employee to return to work within 7 consecutive days after being requested to do so in writing by the employer may cause the employee to be disentitled to termination notice or termination pay, if the employer decides to terminate the employee's employment.

VI. CONCLUSION

British Columbia's legislation is somewhat lacking in detail when compared to its counterparts in Alberta and Ontario on the subject of temporary layoff. The B.C. *ESA* merely provides a definition of 'temporary layoff' and scarce, if any, guidance on the layoff process. Alberta's legislation, though most markedly pro-employer, provides the most clarity on temporary layoff when considering when it occurs, whether there can be an extension, and whether there is a right to recall. None of the legislation set out any notice requirements for temporary layoff. However, in Alberta, the Court of Appeal in *Vrana* delineated a notice requirement and the minimum content of notice. Clearly setting out notice requirements in the legislation would foster more open and honest communications between the employer and the employee and allow for better management of their affairs. Also, in the case of British Columbia and Ontario legislation, it is advisable that the legislation specifically state that temporary layoff is only permitted where the employment contract provides for such practice or where the employee has consented to it in writing. As the policy considerations underlying the legislation supposedly tend to value flexibility, efficiency, fairness, and open communication, such changes would be consistent with the spirit of the legislation.

The courts have fortunately clarified some of the shortcomings of the statutes. It is clear that the common law regime is paramount where the employment contract does not contemplate temporary layoff, as set out in *Collins* and *Elsegood*. The Alberta decision in *Vrana* highlights the need for direction when an employer is placing an employee on temporary layoff. The Supreme Court of Canada decision in *Potter* demonstrates that the common law continues to have a big part to play

in the employment relationship with constructive dismissal and the new indication of a duty to provide work.

In all, the employment standards legislation does not provide optimum guidance to employers and employees regarding the use of temporary layoff as evidenced in cases like *Collins* and *Besse* where the unclear language of the B.C. *ESA* was not only misleading, but had liability consequences on employers. The same can be said of the Ontario *ESA* which shares some important features with the B.C. *ESA*, in that, it does not expressly grant the employer an affirmative right to temporarily layoff an employee and simply defines “temporary lay-off”. Conversely, in the case of employees, it is likely that many, on cursory examination of the B.C. *ESA* or the Ontario *ESA*, have mistakenly accepted temporary layoffs believing the language of the legislation permits employers the right to layoff temporarily.

As such, the courts have been asked on many occasions to clarify what is the scope of the legislation. The common law has been shown to apply where temporary layoff, under employment standards legislation, has not been implemented properly. It is not that the common law regime and the statutory regime are at odds and incompatible. They inform each other and have clear instances of applicability. However, the statutory regime is more geared towards preserving rights of the employer rather than obligations owed by the employer. The common law, on the other hand, tends to favour the employee by providing for constructive dismissal, the duty to provide work and a requirement for the employer to communicate sound business reasons for imposing administrative suspension such as temporary layoff. The courts continue to monitor and correct the imbalance created as a result of temporary layoff. However, it is now time for the legislatures to step in and reform the employment standards legislation in order to clarify rights arising from temporary layoff. It does a disservice to both, the employer and the employee, to have to rely on unclear legislation and to have to understand their respective rights on the subject by having to interpret confusing court decisions in their respective provinces. But for the helpful guidance in the form of factsheets of the different provincial employment standards boards and branches, the parties would suffer even more confusion.

ⁱ RSBC 1996, c.113

ⁱⁱ BC EST #D171/97

ⁱⁱⁱ RSA 2000, c. E-9

^{iv} 2004ABCA 126

^v 2000, S.O. 2000, c.41

^{vi} *Turner v. Uniglobe Custom Travel Ltd.*, 2005ABQB 513; *Vrana v. Procor Ltd.*, 2004ABCA 126

^{vii} Chris Stockwell, November 23, 2000, session 37:1

^{viii} Dominic Agostino, December 20, 2000, session 37:1

^{ix} <http://calgarybuzz.com/2016/04/premier-rachel-notley-televised-speech/>

^x 1995 CanLII 919

^{xi} *Collins*, *supra* at para. 23

^{xii} 2009 BCSC 1316

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- xiii *Besse*, *supra* at para. 80
- xiv S. Bhalloo and G. Carline, “Employers Beware: The Myth of Temporary Layoff May Result in Wrongful Dismissal Liability”
- xv 2014 BCSC 11
- xvi 2016 BCSC 1473
- xvii 2016 BCSC 2134
- xviii *Mahood*, *supra*, at para. 43
- xix *Slumber*, *supra*; *AVT Audio Visual Telecommunications Corporation*, BC EST #D187/02
- xx *D.J. Weed Busters Ltd.*, BC EST #D052/12 at paras. 24-25
- xxi 2004 ABCA 126
- xxii 2003 ABQB 98 (rev’d on other grounds), at para. 23
- xxiii *Vrana*, *supra*, at paras 24-25
- xxiv *Vrana*, *supra*, at paras. 8 and 13
- xxvi 2011 ONCA 831
- xxvii *Elsegood*, *supra*, at para. 14
- xxviii *Elsegood*, *supra*, at para. 5 and 6
- xxix *Elsegood*, *supra*, at para. 14
- xxx 2013 ONSC 2715
- xxxi [1997] OJ No 6383 (QL)
- xxxii *Trites*, *supra*, at para. 29
- xxxiii 2013 ONSC 2715 (Canlii)
- xxxiv 2016 ONSC 1925
- xxxv 2016 ONSC 4127
- xxxvi *Martellacci*, *supra*, at para. 30
- xxxvii [1997] 1 S.C.R. 846
- xxxviii *Farber*, *supra* at para. 33
- xxxix 2015 SCC 10
- xl *Potter*, *supra*, at para. 32
- xli *Ibid* at para. 34 to 35
- xlii *Ibid* at para. 2
- xliii *Ibid* at para. 33
- xliv *Ibid* at para. 33
- xlvi *Ibid* at para. 42
- xlvii *Ibid* at para. 46

xlvi *Ibid* at para. 81, 99

xlvi *Ibid* at para. 63