

Part II: Temporary Layoffs & Constructive Dismissal under the Amended Employment Standards Act



By Ashley Winberg

In our prior article titled *Recent Amendments to the Employment Standards Act Regarding Temporary Layoffs and Constructive Dismissal*, we discussed Ontario Regulation 228/20: Infectious Disease Emergency Leave (the “**Regulation**”), which provides that non-union employees who are temporarily laid off as a result of COVID-19 during the “COVID-19 Period”, which is defined in the Regulation as March 1, 2020 to the date that is six weeks after the date that the declaration of emergency in Ontario comes to an end, are deemed to be on “infectious disease emergency leave” under the *Employment Standards Act*.

On July 21, 2020, Bill 195, Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 (the “**Reopening Act**”) received Royal Assent, and came into force on July 24, 2020. Pursuant to the Reopening Act, the declaration of emergency in the Province of Ontario officially came to an end on July 24, 2020.

Since the declaration of emergency ended on July 24, 2020, the “COVID-19 Period” under the Regulation will come to an end on September 4, 2020, which is six weeks after July 24, 2020. Thus, any employees who are not recalled back to work by September 4, 2020, will be deemed to have been temporarily laid off with effect as of September 4, 2020, and the normal provision of the *Employment Standards Act* pertaining to the temporary layoffs will apply.

Under the *Employment Standards Act*, employers can temporarily lay off employees for up to 13 weeks in any consecutive 20-week period or for up to 35 weeks in any consecutive 52-week period (if certain conditions are met). If an employee is not recalled back to work within the applicable statutory temporary layoff period, the employment relationship will be deemed to have been terminated, and the employee will be entitled to reasonable notice of termination under the *Employment Standards Act* and/or the common law, whichever is applicable.

It is important to note that although the *Employment Standards Act* permits employers to temporarily layoff employees as detailed above, at common law, if the employer does not have a contractual right to temporarily layoff the employee or if the employee does not consent to the temporary layoff, the employee can consider themselves as being constructively dismissed as of the date that they are temporarily laid off and in such an instance, the employee will be entitled to reasonable notice of termination under the *Employment Standards Act* and/or the common law, whichever is applicable.

In summary, if an employer does not recall an employee who was temporarily laid off as a result of COVID-19 during the “COVID-19 Period” by September 4, 2020:

- the employee will be deemed to have been temporarily laid off with effect as of September 4, 2020, if the employer has the contractual right to temporarily layoff the employee and/or if the employee consents to the temporary layoff; or
- employee can consider themselves as being constructively dismissed as of September 4, 2020, if the employer does not have the contractual right to temporarily layoff the employee and the employee does not consent to the temporary layoff.

In such an instance, if the employer does not recall the employee back to work within the applicable statutory temporary layoff period, which would commence on September 4, 2020, the employment relationship will be deemed to have been terminated, and the employee will be entitled to reasonable notice of termination under the *Employment Standards Act* and/or the common law, whichever is applicable.

However, if an employer does not recall an employee who was temporarily laid off as a result of COVID-19 during the “COVID-19 Period” by September 4, 2020, and the employer does not have a contractual right to temporary layoff the employee or if the employee does not consent to the temporary layoff effective September 4, 2020, at common law the employee can consider themselves as being constructively dismissed as of September 4, 2020, and in such an instance, will be entitled to reasonable notice of termination under the *Employment Standards Act* and/or the common law, whichever is applicable.

It is important to keep in mind, that the common law and the *Employment Standards Act* are two separate legal regimes. Thus, although the Regulation amends portions of the *Employment Standards Act* that pertain to temporary layoffs and constructive dismissal, it is unclear whether these amendments will impact the common law's consideration of these issues. For example, if an employee is temporarily laid off as a result of COVID-19 during the COVID-19 Period and their employer does not have a contractual right to temporarily lay them off and they do not consent to the temporary layoff, at common law, the employee could consider themselves as being constructively dismissed and sue their employer for constructive dismissal. However, with the introduction of the Regulation, the employee would be deemed to have been put on infectious disease emergency leave during the COVID-19 Period under the *Employment Standards Act* and their employer's right to put them on such leave would not be deemed to be constructive dismissal under the *Employment Standards Act*.

Because the common law and the *Employment Standards Act* are two separate legal regimes, employers cannot assume that the Regulation justifies temporary layoffs if the employer does not have the contractual right to do so and the employee does not consent to the same. Thus, prior to taking any action, it is advised that all employers consult with their legal professionals to assess their risk exposure and their best course of action.

Ashley Winberg is one of the leading condominium lawyers in Ontario and is the Head of Corporate Practice at Pulver on Condos, which is a boutique condominium law firm that provides specialized legal services to condominium corporations and unit owners throughout Ontario. Ashley can be reached at ashley@pulveroncondos.com.

This article was originally published in July 2020.
