

Labour & Employment Law Update

A Cautionary Tale about Temporary Layoffs

A recent decision of the B.C. Supreme Court, *Besse v. Dr. A.S. Mechner Inc.*, 2009 BCSC 1316, serves as a reminder that employers do not have the right to lay off employees temporarily (and without severance) unless this right is specified in the employment agreement. In this case, a dentist was seeking to reduce the staffing costs associated with his practice. He contacted the Employment Standards branch and was provided information to the effect that an employer is not required to give notice or pay compensation in lieu if an employee is temporarily laid off for a period not exceeding 13 weeks. Given this information, the dentist informed one of his receptionists that she was being laid off for a period of 12 weeks and six days. While the information provided by the Employment Standards Branch correctly summarized the temporary layoff provisions of the *Employment Standards Act*, it did not take into consideration the common law requirements relating to a layoff.

Counsel for the employee subsequently advised the dentist that the employee considered herself to have been constructively dismissed as there was no right to layoff/recall under the employment agreement. On learning of his error, the dentist wrote to the employee offering her a return to her position and payment of any lost wages due to the layoff. The employee refused the offer and sued for damages for wrongful dismissal.

At trial, the court confirmed that in the absence of an express contractual provision permitting layoff, the imposition of a temporary layoff constituted a fundamental breach of contract. Even though the temporary layoff in this instance was not intended to terminate the employment relationship, the layoff was a repudiation of an essential term of the employment contract. The plaintiff was entitled to treat the layoff as a constructive dismissal.

However, the plaintiff was not as successful in obtaining an award of damages. Applying the decision of the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, the court found that the facts established no good reason why a reasonable person would refuse the offer to return to her former position. As a result, the plaintiff's damages were limited to the approximately one month period between the date of her layoff and the date of the offer to return to employment.

The decision serves as a reminder that if an employer wishes to take advantage of the provisions under the *Employment Standards Act* for temporary layoff, the right to layoff must already exist, either as an express term of the employment agreement or as implied term based on established industry practice. The temporary layoff provisions in the *Employment Standards Act* only serve to limit an employer's exposure to pay *Employment Standards Act* severance. Employers may wish to consider revising their employment agreements to permit temporary layoffs as provided under statute. The decision further serves as a reminder that the Employment Standards Branch



can only give advice about the provisions of the Act and does not have the ability to give more general legal advice including advice relating to the relationship between the provisions of the Act and common law requirements.

For more information please contact one of the lawyers listed below.

Team Members

Name	Phone	Email
Deborah Cushing	604.631.9282	dcushing@lawsonlundell.com
Nicholas Ellegood	604.631.6706	nellegood@lawsonlundell.com
Patricia Gallivan, Q.C.	604.631.6718	pgallivan@lawsonlundell.com
Sarah Kay	867.669.5523	skay@lawsonlundell.com
(M.J.) Peggy O'Brien	604.631.9201	pobrien@lawsonlundell.com
Walter Rilkoff	604.631.6719	wilkoff@lawsonlundell.com
Melanie Samuels	604.631.9107	msamuels@lawsonlundell.com
Rob Sider	604.631.6722	rsider@lawsonlundell.com
Nicole Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com
Paul Smith	867.669.5532	psmith@lawsonlundell.com

©2009, Lawson Lundell LLP. All rights reserved. The information provided in this publication is for general information purposes only and should not be relied on as legal advice or opinion. For more information, please contact one of the lawyers listed above. To be removed from this mailing list please send an e-mail to genmail@lawsonlundell.com or phone the Marketing Department at 604.685.3456.