DECEMBER 2021

BRIEFING NOTE

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PANDEMIC AND TEMPORARY LAYOFFS: RISKS FOR EMPLOYERS

The ongoing COVID-19 pandemic has brought several issues to the forefront for employers and employees, one of which has been temporary layoffs and whether employers are legally permitted to do so in the absence of a contractual provision.

The courts have affirmed that absent a contractual provision allowing same; or an agreement from the employee to the temporary layoff, a unilateral temporary layoff will constitute a constructive dismissal.

***Hogan* v. *1187938 B.C. Ltd.*, 2021 BCSC 1021**

In *Hogan*, the court confirmed that, absent a contractual right to a layoff, a unilateral layoff constitutes a constructive dismissal.

In this case, the defendant employer, Mercedes-Benz Vancouver ("MBV") was a car dealership whose operations were significantly diminished in March 2020 when the COVID-19 pandemic first swept Vancouver. The plaintiff, Terence Hogan ("T") was a service manager with MBV. Due to customers cancelling non-essential service appointments, MBV laid T off on March 24, 2020, along with a number of its other employees. T agreed to a temporary layoff notice on the understanding that he would be recalled back to work. Unfortunately, MBV's business continued to decrease and MBV never called T back to work and instead terminated his employment in August 2020 (after roughly 22 weeks). T brought a claim for constructive dismissal.

The Court considered whether or not T had been constructively dismissed at the time of the March 2020 layoff. In doing so it applied the two-branch test first described in the case of *Potter* v. *New Brunswick Legal Aid Services Commission*, 2015 SCC 10. The first branch consists of a single unilateral act that breaches an essential term of the contract. The second branch is a series of acts that, taken together, show the employer no longer intends to be bound by the contract.

The Court confirmed that determining whether an employee has been constructively dismissed is a fact-specific endeavor and necessitates a court to decide whether the changes to the employee's contract are reasonable; whether they are within the scope of the employee's job description or

employment contract; and whether an employer was acting in good faith to protect a legitimate business interest, and whether that action had a minimal impact on the employee.

MBV argued that the layoff and subsequent termination were the result of the economic fallout of the pandemic, and therefore was in good faith. However, the Court took note that the layoff had a significant impact on T – he was not paid during the layoff and was never called back to work. Further, there was no evidence before the Court that the employment contract authorized MBV to unilaterally place its employees on temporary layoff.

Given the unilateral nature of the layoff and the subsequent termination, the Court held that the employer no longer intended to be bound by the employment contract at the time it laid the plaintiff off.

In assessing damages the Court held that the amount T received from the government in CERB payments should be deducted from the total damages based upon the contract law principle that the plaintiff would be in a better position without the CERB deduction than if he had been given reasonable notice. CERB was not, the Court noted, private insurance or pension earnings that require employee contribution throughout the employment term.

***Andrews* v. *Allnorth Consultants Limited*, 2021 BCSC 1246**

Hogan can be compared with another COVID-era wrongful dismissal case, *Andrews* v. *Allnorth Consultants Limited*. In *Andrews*, the plaintiff, Ian Andrews ("A"), was placed on a temporary layoff due to a COVID-19 related decline in workload. A agreed to the 24 week layoff, **but** he did not agree to a subsequent variance of the layoff, which he became aware of on September 14, 2020, that would have pushed his return date to at least the end of December, and likely until Spring of 2021. Despite A's lack of consent to the variance, the employer proceeded with it. A subsequently sued the employer, alleging wrongful dismissal.

The Court found that A had been terminated when A refused to agree to the variance, as this was a unilateral decision made by the employer. As in *Hogan*, the Court also dealt with CERB in *Andrews*. However, the Court declined to take CERB into account in assessing damages on the basis that the plaintiff was likely to have to pay the benefits back. The Court did not provide further reasoning for this decision.

***Ehman* v. *Preston Chevrolet Buick GMC Cadillac Ltd.*, 2021 BCSC 1033**

In this case, the plaintiff Robert Ehman ("R") was on an already-reduced schedule with the automotive dealership employer (3 days per week) when the pandemic hit. The employer temporarily reduced R's hours to one day per week beginning on March 24, 2020 so that the employer could purportedly install Plexiglas barriers and other physical distancing measures, and R agreed to the temporary reduction in hours. On April 20, 2020 R was temporarily laid off effective immediately. At that time the employer had

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not installed Plexiglas barriers or implemented physical distancing protocols. In August 2020, R was terminated was provided with 8 weeks of severance. At the time R was a 69 year old Tower Operator who had worked for the employer for 13 years.

The Court found that there was "no dispute" that the plaintiff had been dismissed without cause and did not receive reasonable notice. The only question was the damages and whether they would be calculated based on his pre-layoff three days/week or based on his one day/week during his temporary lay off.

The Court agreed with the plaintiff that when R's employment was terminated, he had a contractual right to work three days a week and that was what the damages should be based on. The Court stated that working one day a week was never intended to be more than a temporary arrangement to give the employer time to put the necessary arrangements in place to protect its employees from COVID-19, and R never agreed to it on a permanent basis and further a reduction of R's employment to one day/week would in and of itself be a breach of contract.

WHAT THIS MEANS FOR EMPLOYERS

The law concerning constructive dismissal remains relatively the same as it was prior to the pandemic. Constructive dismissal occurs when an employer either breaches a fundamental term of the employment contract or, through a series of acts, the employer indicates that it no longer intends to be bound by the contract. These cases highlight that the courts continue to apply the same test even during unforeseen circumstances such as the COVID 19 pandemic.

While the pandemic has resulted in many employers implementing short layoff in good faith action to protect business interests, an employer faces significant risk of a constructive dismissal claim where, there is no contractual provision allowing it; the temporary layoff ultimately results in termination (as in *Hogan*); or where an employee does not consent to the temporary layoff (as in *Andrews*).

In *Hogan* the court found that several months without pay was a significant burden on an employee who had been led to believe he would be called back to work, and had declined to pursue alternative employment based upon this belief.

In *Andrews*, the employee agreed to the initial layoff, but did not consent to the extension of the temporary layoff and in part that formed the basis for the constructive dismissal finding.

In *Ehman*, there was less of a question of whether the plaintiff had been dismissed without notice than of what his appropriate notice would be. Because the plaintiff did not agree to a permanent change in days per week, his notice was calculated based on his original work schedule.

In terms of risk management and preventative measures, it is prudent to include a clause in the employment contract that permits the employer to

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implement unilateral temporary layoffs (in accordance with the *Employment Standards Act*, if applicable) to allow the employer flexibility where unforeseen circumstances lead to a decline in business operations. Transparency and clear language helps to prevent ambiguity during temporary layoffs and decreases the risk that a decision-maker may view a unilateral layoff as a fundamental breach of the employment contract.

If you would like more information, please contact us.

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