



Acquiescence or Condonation of a Temporary Layoff

The Court of Appeal's decision in [Pham v. Qualified Metal Fabricators Ltd.](#), confirms that an employee who has seemingly acquiesced to a COVID-19 related layoff for over nine (9) months, has not necessarily condoned the layoff and can pursue a claim for constructive dismissal.

The Facts

The employer manufactured metal structures and received most their business from the aerospace and food service industries; they suffered significant revenue losses because of the COVID-19 pandemic. Consequently, they laid off 31 of their 140 employees. The plaintiff, Pham, had almost 20 years of service when he was laid off on March 23, 2020. The layoff was meant to be temporary, for a period of 13 weeks, and Pham was told that the employer hoped to recall him by June 19. Pham was provided a Layoff Letter and though a signature was beside his name on the Letter, his evidence was that he did not sign the Letter.

On June 2, 2020, the employer extended the layoff for "up to 35 weeks". The layoff was extended again on September 23, at which point the employer provided Pham with a letter advising him that the layoff was subject to [Ontario Regulation 228/20](#) under the ESA. The Regulation provided that an employee whose hours of work were temporarily reduced or eliminated for reasons related to COVID-19 was retroactively deemed to be on Infectious Disease Emergency Leave ("IDEL") rather than terminated. Pham's layoff was extended a final time on December 9, 2020, until September 4, 2021. Pham consulted a lawyer who wrote to the employer on December 22, alleging wrongful dismissal. Pham secured alternative employment on February 3, 2021, and received a letter of recall from the employer on February 9, 2021; he did not respond.

Summary Judgement Motion

The employer brought a motion for summary judgment seeking dismissal of the action. The employer argued that there was no express right to layoff Pham in his employment contract, but it had an implied right to conduct the layoff



because of its past practice of laying off employees in 2009. The employer further argued that Pham had condoned the layoff by signing the Layoff Letter, by engaging legal advice in March 2020, and by failing to object to the layoff. The motion judge granted the employer's motion for summary judgment and dismissed the claim for wrongful dismissal.

Court of Appeal's Decision

The Court of Appeal found that the motion judge's failure to consider whether there was an implied term allowing Pham to be placed on a temporary layoff was a reversible error of law. Moreover, the fact that the employer had previously laid off some of Pham's co-workers did not justify the motion judge's finding that this constituted an implied term in Pham's contract permitting Pham to be laid off.

The motion judge had also erred when he concluded that condonation was established and that there was no genuine issue for trial. First, assuming the signature on the Layoff Letter was Pham's, there was no evidence the signature was anything more than an acknowledgment of receipt of the layoff terms. Second, Pham had contacted a lawyer in December 2020, which was long after the layoff began and days before asserting his claim for constructive dismissal; this was not evidence that he consented to or understood the ramifications of the layoff in March 2020. Lastly, Pham's failure to object to the layoff was not evidence of condonation.

While the motion judge had considered the effects of Pham's silence in the face of the continued layoffs, he had erred when he failed to consider that there was a genuine issue regarding whether Pham took a reasonable time to assess his situation before claiming constructive dismissal. The Court concluded that,

there is no evidence capable of supporting the motion judge's conclusion that the wrongful dismissal action should be dismissed. On the contrary, on the evidence before us, there is a live issue as to whether there was condonation (at para 58).

The action for wrongful dismissal was remitted back to the Superior Court for trial.



What about IDEL?

In [previous articles](#), we discussed the Superior Court's conflicting decisions in [Coutinho v. Ocular Health Centre Ltd](#), and [Taylor v. Hanley Hospitality Inc](#). In *Coutinho*, the Court held that despite the IDEL regulation, employees were still permitted to bring claims of constructive dismissal under the common law as section 8(1) of the ESA states that "no civil remedy of an employee against his or her employer is affected by this Act". The Court in *Taylor* however refused to follow *Coutinho* and found that all temporary layoffs related to COVID-19 were deemed IDEL retroactive to March 1, 2020, and that any argument regarding the common law on layoffs was inapplicable and irrelevant.

While the Court of Appeal in *Pham* referenced *Coutinho's* conclusion that employees who are unilaterally laid off have "an immediate right to pursue a claim for constructive dismissal" (at para 30), the Court did not opine on the application of Regulation 228/20 in the *Pham* case since the employer had advised the motion judge it would not rely on the Regulation in its arguments and instead, rely exclusively on the condonation/acquiescence argument.

Takeaways

- An employer's right to layoff employees, absent an express term in the employment contract, may not be implied unless it is obvious from the facts of the case.
- The fact that co-workers have been previously laid off does not create a legal basis for an employer to impose a layoff on another employee.
- Condonation requires an objective determination that the employee "consented freely to the change" in their terms of employment.
- Condonation in the face of a layoff is expressed by positive action such as expressed consent; silence is not equal to condonation.



The article in this update provides general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hunter Liberatore Law LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hunter Liberatore Law LLP.