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LAYOFF AMOUNTS TO A WRONGFULLY DISMISSAL

An employee's layoff after 12 years of employment was a wrongful dismissal because she had never validly consented to being subject to layoff, an Ontario judge has ruled. Finding that she was not made aware of an employee handbook that included provisions for layoff when she was hired, the judge ruled that she was not subject to those provisions, and further, that when she accepted a lateral move 10 years later for which she was required to accept in writing a new offer of employment that indicated that she had read and accepted the terms of the employee handbook, those terms were still not binding on her because she had received nothing in exchange, i.e. no new consideration, for accepting them.

In 1998, kitchen designer Natalie McLean was hired by Raywal Limited Partnership, a company that built custom kitchens in the residential construction industry.

When McLean was initially hired, Raywal had an employee handbook that included provisions for layoff. However, she was not advised of this in the written offer of employment, nor was she provided with a copy of the handbook. McLean was not required to confirm in writing that she acknowledged the existence of the handbook or that it was part of her contract of employment.

In June 2008, while still employed by Raywal, McLean was offered and accepted a new position that she described as a "lateral move." At that time, she was obliged to accept in writing a new offer of employment that indicated that she agreed that she had read and would follow the policies of the employee handbook. This handbook contained provisions that governed layoff. Aside from being able to continue her employment, McLean was not provided with any consideration in return for her agreement to the terms of the written offer of employment in June 2008.

On October 22, 2010, McLean was laid off with a recall date of June 27, 2011. Her benefit package was continued during the period of layoff, and both she and Raywal contributed to the benefit premiums during this period.

By letter of May 27, 2011, McLean was recalled, but she did not accept the recall and did not return to work. She sued the employer in Ontario Superior Court for damages in lieu of notice.

Finding that McLean never validly consented to be subject to the layoff provisions, Ontario Superior Court Judge Kevin Whitaker ruled that she could not be laid off and was dismissed without cause. He awarded her 10 months' pay in lieu of notice.

Although acknowledging that Raywal had a legitimate business interest in being able to lay off and recall employees, given the cyclical demand for skilled labour in the construction industry. Justice Whitaker nevertheless held that, in the absence of a contractual basis for a layoff, a purported layoff would be considered a dismissal as the concept of a layoff does not exist at common law.

Finding that there was no contractual basis for layoff in McLean's contract of employment signed on July 15, 1998 because it did not refer to layoff, nor was there any reference in it to indicate that the layoff provisions of the employee handbook applied to her, Whitaker characterized the "only issue" as " whether the employee handbook layoff provisions in [McLean's] contract of employment amended on June 27, 2008, [were] enforceable." Determining that they were not because of the absence of consideration, Whitaker relied on the Ontario Court of Appeal's decision in *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783, for the proposition that "continuing employment cannot amount to consideration in exchange for a change in the terms of employment." He stated:

“In the present case, other than the continuation of employment under new terms with an arguable change in job function, there was no obvious or certain improvement in compensation or other terms of employment. I do not consider the continuation of the benefits plan as consideration or an acceptance of the layoff. Employers may continue benefits after dismissal for a variety of reasons.”

[McLean] was given no consideration. For this reason, the change in terms of employment so as to include the layoff provisions of the employee handbook [is] unenforceable against [McLean].

In the result, determining that she was wrongfully dismissed rather than laid off, Whitaker awarded MacLean damages of 10 months' pay in lieu of notice, leaving it to the parties to calculate the amount.

Courts have affirmed on numerous occasions the general principle that changes to a pre-existing contract will not be enforceable unless there is a further benefit given. The requirement of consideration to support an amended agreement is especially important

in the employment context where, generally, there is inequality of bargaining power between employees and employers.