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TEMPORARY LAY-OFF OF NON-UNIONIZED WORKERS

The Ontario *Employment Standards Act, 2000* (the "ESA") makes it possible for an employer to temporarily layoff its employees, provided that:

- The layoff does not last for more than 13 out of 20 consecutive weeks; or
- The layoff is less than 35 out of 52 consecutive weeks, and one of a list of conditions prescribed by the ESA is met (including, for example, the employer's continuation of the employee's group insurance coverage throughout the period of layoff); or
- With respect to a unionized worker, the layoff does not exceed such longer period as may be prescribed in the applicable collective agreement, and the employee is recalled within the stipulated time frame.

Notwithstanding that temporary layoff is permissible under the ESA, it is well-established that an employer will face liability at common law in the event that such a layoff amounts to a breach of a worker's contract of employment. In that regard, unless the right to invoke temporary layoff has been specifically reserved by an employer (for example, via an appropriately worded employment agreement or offer letter), an employee who is purportedly laid off can take the position that he or she has in fact been constructively dismissed.

Accordingly, while it is commonplace in unionized workplaces, temporary layoff is rarely contemplated outside the collective bargaining context. Indeed, absent employee consent, the imposition of temporary layoff has historically not represented a practicable strategy for non-unionized employers. The recent decision of the Ontario Superior Court of Justice in *Chevalier v. Active Tire & Auto Centre Inc.*, 2012 ONSC 4309, reconfirms the principle that involuntary layoff will generally constitute constructive dismissal; and indeed, the Plaintiff's layoff in that case had the effect of terminating his employment. Significantly, however, the evidence before the Court compelled Mr. Justice Lococo to the conclusion that the Plaintiff was not entitled to any damages; and his wrongful dismissal claim was therefore dismissed.

After 33 years of employment with Active Tire & Auto Centre Inc. ("Active Tire", or the "Company") and its predecessors, the Plaintiff received written notice of layoff on October 28, 2008. He then promptly commenced litigation for constructive dismissal, and claimed pay in lieu of 24 months' notice. Following receipt of his claim, Active Tire contacted the Plaintiff and advised that (a) the Company had laid him off under the mistaken belief that it was entirely permissible for them to do so, and (b) in any event, the Company was prepared to have him return to work. The Plaintiff rejected that proposition, and proceeded with the litigation.

The parties agreed that the Plaintiff's temporary layoff had resulted in his constructive dismissal; and Mr. Justice Lococo accepted the Plaintiff's submission that he was a candidate for a termination package based on pay in lieu of 24 months' notice.
That said, His Honour also observed (at para. 19) that: "Where an employee has been wrongfully terminated, the employee must take reasonable steps to mitigate his or her damages as a matter of contract law. Any benefit derived from complying with this duty must be deducted from damages awarded in lieu of reasonable notice."

Further to that principle, Active Tire's defences to the action included the argument that the Plaintiff's duty to mitigate obliged him to accept the Company's request that he return to work. In considering the Company's argument, Justice Lococo noted the Supreme Court of Canada's 2008 decision in *Evans v. Teamsters Local Union No. 31*, [2008] S.C.R. 661, which establishes that: Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. . . . The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable.

Applying that test to the evidence before him, His Honour concluded (at para. 44) that "Active Tire has met the required onus of establishing that a reasonable person would have accepted the opportunity to return to work . . . when that opportunity was presented to Mr. Chevalier. Therefore, he failed to take appropriate steps to mitigate his damages,
with the result that his damages in lieu of notice would be nil."

Significantly, Justice Lococo made that determination in the face of:
(a) the Plaintiff's argument that "management personnel had engaged in conduct intended to 'make his life miserable'
. . . [which] included unfair criticism of his work, treating him in a demeaning fashion and ignoring his contractual rights by requiring him to work in Toronto more than 50 kilometres from home"; and
(b) the fact that the Plaintiff had initiated litigation promptly following his layoff, which no doubt engendered animosity between the parties.

On the former point, His Honour "accept[ed] the evidence of the defence witnesses that their conduct relating to Mr. Chevalier, viewed objectively, was directed toward making him a more

effective contributor as an employee of Active Tire, rather than making his life miserable so that he would leave the company"; and on the latter point, Justice
Lococo concluded that the commencement of litigation was "not determinative and in the circumstances would not tip the balance against requiring Mr. Chevalier to return to Active Tire."

It is also interesting to note that the Court assessed the Plaintiff's damages as nil despite the fact that employees' entitlements to termination and severance pay pursuant to the ESA are not subject to offset based on mitigation. In that regard, inasmuch as His Honour's decision is silent on this issue, it is possible that statutory damages were not
claimed. Moreover, it would seem that no statutory damages would be recoverable in any event, given that:
(a) the Plaintiff's layoff did not contravene the ESA; and
(b) the cessation of his employment occurred in circumstances that disentitled him to statutory termination pay and severance pay pursuant to Regulation 288/01 of the ESA, namely: (i) his refusal of "an offer of reasonable alternative employment with the employer", and (ii) his failure to return from temporary layoff "within a reasonable period of time after having been requested by his or her employer to do so."

Ultimately, the Court dismissed the Plaintiff's claim its entirety; with the result that, as a consequence of his own actions, he literally walked away from more than 30 years of employment with no termination pay and no severance pay.

Commentary
This decision is noteworthy as a further addition to the body of case law that is emerging from the Supreme Court of Canada's decision in *Evans v. Teamsters Local Union No. 31*, and which requires employees who assert constructive dismissal claims to consider the reasonableness of their particular circumstances before refusing to remain with their
employers, in their changed roles, during their claimed periods of "reasonable notice" (and thereby mitigating their alleged damages).

Even more interesting are the potential implications of Justice Lococo's ruling in relation to the utility of temporary layoff as a strategic tool for non-unionized employers.

In that regard, although it remains true that the temporary layoff of a non-unionized employee will generally constitute constructive dismissal at common law (i.e., leaving aside circumstances in which an employer has expressly reserved a contractual right to place a worker on temporary layoff), the Court's decision appears to support the proposition that,

as long as:
(a) a temporary layoff is implemented in good faith, and in accordance with the ESA; and
(b) the employee's subsequent return to work would not otherwise place him or her in an objectively hostile, embarrassing or humiliating situation, the employee is obliged to accept his or her employer's notice of "recall" in mitigation of his or her alleged wrongful dismissal damages.

Furthermore, neither legitimate performance management/corrective action by the employer, nor aggravating circumstances of the employee's own making (such as initiating litigation), will be deemed to present hostile, embarrassing or humiliating circumstances sufficient to displace that obligation. In other words, the ruling in *Chevalier v. Active Tire & Auto Centre Inc.* may signal that temporary layoff of non-unionized employees is no longer such a "non-starter" as has historically been the case. Although proceeding with such layoffs remains an exercise to be approached carefully, further interpretation and application of the Court's decision in this matter could lead to interesting and favourable new legal developments for non-unionized employers.