

Can an Employment Standards Act breach by an Employer support an Employee's claim for common law damages?

After being laid off for a total of 35 weeks in one year, Brian Elsegood filed a claim for wrongful dismissal in Ontario Small Claims Court rather than seek termination pay under the provincial *Employment Standards Act (ESA)*.

Employed by Cambridge Spring (2001) Service Ltd. as a technician for some seven years, Elsegood had no written employment contract. He was laid off for the first time on April 4, 2009, and then was recalled on June 9, 2009. He was laid off again on July 28, 2009. By January 22, 2010, the cumulative duration of the layoffs reached the statutory maximum under the *ESA* of 35 weeks within a 52-week period.

Section 56(1) of the Act provides that "[a]n employer terminates the employment of an employee for purposes of section 54 if ... (c) the employer lays the employee off for a period longer than the period of a temporary lay-off." Section 56(2)(b), in turn, defines a temporary layoff as "less than 35 weeks in any period of 52 consecutive weeks." Section 54 of the Act prohibits termination of employment without notice or payment in lieu of notice.

Following his second layoff by Cambridge Spring, Elsegood considered that he remained on the employer's payroll subject to recall. However, on January 22, 2010, when the length of his layoff reached 35 weeks within a 52-week period, Elsegood brought a claim for damages for wrongful dismissal in Ontario Small Claims Court rather than claiming termination pay under s.54 of the *ESA*.

A Small Claims Court judge awarded Elsegood \$9,900 in damages, reflecting a notice period of six months together with interest and costs of \$2,060. The Ontario Divisional Court dismissed the employer's appeal.

The employer then appealed to the Ontario Court of Appeal who decided in favor of the Employee.

Submitting that the *ESA* and the common law are independent regimes, the employer argued that an employee's "actual" employment status is defined by the common law

and that the *ESA* operates only to entitle the employee to the remedies under the *ESA*. Based on this premise, the employer maintained that common law damages for wrongful dismissal are only available for what would constitute a dismissal at common law and are not available for a "deemed termination" under the *ESA*. In support of its position, the employer argued that the inclusion of "for purposes of s.54" in the provision indicated that the employee was not terminated for all purposes.

The Ontario Court of Appeal dismissed the appeal, upholding the trial judge's award of damages for wrongful dismissal.

In the unanimous decision of a three-member panel of the Court, Justice Russell Juriansz first rejected the employer's argument that the *ESA* and common law operate as two independent regimes, stating: "Simply put, statutes enacted by the legislature displace the common law."

Rejecting the employer's contention that the employment was terminated only for the purposes of s.54 of the Act, Juriansz held that s.54 does not serve to define termination under s.56(1) but simply prohibits an employer from terminating an employee without notice or payment in lieu of notice.

Although observing that this ruling disposed of the appeal, Juriansz went on to add that even if, as the employer claimed, the employee's employment at common law survived the operation of s.56(1), a unilateral layoff by an employer was a substantial change in the employee's employment that constituted a constructive dismissal and would entitle Elsegood to damages for wrongful dismissal.

The issue in this case as to whether the operation of s.56(1) of the *Employment Standards Act* can support an employee's claim for common law damages was a "novel legal question." The Court's emphatically affirmative answer is therefore significant for its determination that employees laid off for longer than the statutory maximum can opt to pursue wrongful dismissal damages in court, rather than accept the compensation which the Act provides, without having to prove more than that the criteria in s.56(1) of the *ESA* have been met.



HACIO LAW

FIRM, FAIR AND FOCUSED ON YOU

***Disclaimer:** All information and articles on this website are provided to you subject to the following disclaimer and conditions of use. We have included Articles on our web site as part of our contribution to making legal information more readily accessible to the general public. We hope that the information provided will be helpful to you in familiarizing yourself with legal issues that may affect you. Our Articles are provided as general background information only. They are not intended to be used as a basis for any particular course of action or as a substitute for legal advice. This site is updated from time to time. At any point in time the content of one of more pages may be outdated. If you require legal assistance always contact a lawyer for advice on your particular circumstances before taking any action. In no circumstances shall the provision of any of information on this site be construed as the provision of advice within a solicitor and client relationship nor shall Hacio Law have any responsibility for any action that may be taken in reliance on information on this website in disregard of the foregoing or otherwise.

