COVID-19 UPDATE: June 1, 2020

Introduction:

This brief weekly bulletin is aimed at keeping employees and employers informed of COVID-19 related changes and concerns in the world of employment. To find more answers to common employment questions, you can:

- Visit the Levitt LLP website COVID-19 page.
- Read Howard Levitt's columns in the National Post.
- Listen to Howard Levitt and the other lawyers from Levitt LLP on Newstalk 1010.
- For a summary of key employment issues, such as whether your employer has a right to place you on a temporary lay-off and your right to a safe workplace, contact us to request the COVID-19 Bulletins previously circulated by Levitt LLP.

Important: Every one's circumstances are different. The information provided in this bulletin and at the above resources is for general information purposes only and is not intended to be legal advice.

If you are interested in obtaining legal advice for your specific problem, you can contact us to book a **free consultation on COVID-19 related issues**. To set up a consultation, call us now at 416-594-3900 or complete this form.

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1. **Q & A with Levitt LLP Lawyer Tatha Swann**

Tatha Swann is a Partner at Levitt LLP. She works with both unionized and non-union employers, as well as executives and other senior-level individuals

Tatha helps employees negotiate employment contracts and severance packages, and negotiates and litigates cases involving wrongful dismissal, constructive dismissal, harassment (including sexual harassment), human rights discrimination and employment standards claims.

In 2015, Tatha represented noted chef Kate Burnham in her complaint against a well-known restaurant in Toronto that made local, national and international news, generating industry-wide buzz on harassment and abuse in the restaurant industry.

Tatha welcomes the opportunity to work with you to help you find the optimal legal solution to your workplace issues.

Q & A

Q: People have a lot of questions about what they can and can't do during this COVID-19 pandemic. What is one of the biggest mistakes you see people making?

One of the biggest mistakes I see is paralysis on the part of employees taking a "wait and see" approach when they have been laid off. A temporary pay cut is one thing, but a full layoff with no work and no pay can easily turn into an unplanned termination.

Q: What is the biggest point of confusion you see among people coming to you for advice?

I find the largest area of confusion relates to how a layoff is treated, what the implications are for an employee, and what their options are.

Q: What is one tip you would give to employees in the current climate? / What is one tip you would give to employers in the current climate?

Employee Tip: Action is better than inaction. A "wait and see" approach generally fails to bring about the desired result if the employee's current situation is undesirable. Forming a plan of action on what to do, whether it's writing a letter to your company or starting a lawsuit, will result in a faster and better outcome.

Employer Tip: It can be helpful to create a contingency plan for the next 1 month, 3 month, and 6 month periods that can be revised depending on changing circumstances.

Q: Courts and tribunals are currently closed. Are you still able to continue advocating for your clients?

Absolutely. My cases are still moving forward, with only minor delays on some files. The vast majority of litigation takes place between legal counsel and does not require the court's involvement.

Q: What are you doing to ride out this crisis?

I am staying (very!) busy with work, keeping in contact (virtually) with friends and family, and planning for better and warmer days ahead!

2. Employment Standards Act ("ESA") Regulation on Temporary Layoffs and Wage Reductions

Ontario has just introduced a new regulation, O. Reg. 228/20 (the "Regulation"), in response to unprecedented "temporary layoffs" and wage cuts due to COVID-19.

The Regulation makes 3 key changes for employees who have had their hours reduced in whole or in part for a reason related to COVID-19 between March 1, 2020 and six weeks after the end of the state of emergency:

1) It deems employees to be on Infectious Disease Emergency Leave;
2) During that period, employees will not be considered laid off as per the *ESA*; and
3) During that period, employees will not be considered constructively dismissed under *ESA*.

Any reduction in employee's hours or wages must have taken place during the period, the Regulation expressly states that the reduction is acceptable if "it is for reasons related to" COVID-19. The language in the regulation is broad, and it remains to be seen is how this will be interpreted by both the Courts and Ministry of Labour.

Relatedly, an employee whose hours have been reduced, or eliminated (i.e. laid off) due to the pandemic, is now instead on a job-protected emergency leave under the ESA, with all of the associated protections, including the right to reinstatement and the right to continue receiving benefits.

3. Does the *ESA* Regulation affect common law claims for Constructive Dismissal

The biggest question is whether the Regulation affects an employee's common law notice entitlements. For long service employees, common law termination entitlements amount to significantly more, calculated in terms of months (up to a maximum of two years) as opposed to weeks of notice under the ESA (one week per year for notice, up to 8 weeks).

If the Regulation were to suddenly preclude constructive dismissal claims in the courts, those employees would have no legal recourse for a dismissal. They would either go back to work, or be left blowing in the wind waiting to be recalled by their employers.

Luckily for employees, the Regulation does not preclude a common law claim for constructive dismissal.

Traditionally, the ESA and common law have operated as separate legal regimes. If an employee is terminated (or indeed, constructively dismissed), they can choose to sue in court for breach of their contractual rights, or to file a claim with the Ministry of Labour for breach of their statutory rights under the ESA.

The fact that these are separate regimes is clear when you consider the historical treatment of temporary layoffs, which are permitted by the ESA, but not permitted under the common law absent a contractual right to do so.

Section 7 of the Regulation specifically references the constructive dismissal provisions in the ESA (clauses 51(b) and 63(1)(b)). As such, the Regulation was intended to apply only to constructive language in the ESA, but not the common law.

Further, section 8 of the Regulation, which addresses what happens to claims for constructive dismissal going forward, does so with reference to the Ministry of Labour only, again confirming that the legislation was meant to operate only within the confines of the ESA.

If the Ontario legislature intended to override the common law, it should expressly state so, as it does elsewhere in the ESA. Until courts rule otherwise, we remain steadfast in our view that this regulation does not preclude a lawsuit in court for constructive dismissal.

4. How does the ESA Regulation Affect You (Q & A)

Q: Is the change regarding constructive dismissal under the ESA retroactive?

The change regarding constructive dismissal is not retroactive. Claims for constructive dismissals which occurred prior to May 29, 2020 are not precluded by the Regulation .

Notably, however, the Regulation suggests that in order to have a constructive dismissal claim prior to May 29, 2020, the employee must have both been constructively dismissed ***and*** resigned in response "within a reasonable period of time" (subsection 7(2) of the Regulation and clause 56(1)(b) and 63(1)(b) of the ESA)).

This suggests that, even if the reduction in hours or pay happened prior to May 29, 2020, if the employee did not resign prior to that date, then their claim may be precluded at the Ministry of Labour.

Q: How does this change affect me if I am already on a temporary layoff/leave due to COVID-19?

With respect to employees who are now on an emergency leave as a result of a reduction in their hours, that leave will be deemed to have started on March 1, 2020 (subsection 3(2) of the Regulation).

If those employees have stopped working altogether, and their employers have been paying benefits as of May 29, 2020, those employers cannot stop doing so for the remainder of the leave. If, however, those employers stopped paying benefits *prior to* May 29, 2020, they will not be required to pay them afterwards while the employee is on leave.

Q: I was temporarily laid off 13 weeks ago, have I now been permanently laid off, and can I seek termination entitlements?

Previously, under the ESA, those temporary layoffs would automatically become terminations after a certain period of time (typically 13 weeks without benefits, or 35 weeks with benefits or other compensation) entitling an employee to statutory notice and possibly severance.

Under the Regulation, those temporary layoff provisions do not apply to employees whose work hours or wages are temporarily reduced or eliminated as a result of "reasons related to" COVID-19 from March 1, 2020 until six weeks after the end of the state of emergency (i.e. six weeks after June 9, 2020, though note that this time can be extended). This means that those employees will not automatically be deemed terminated if they are not recalled to work within the timelines specified in the ESA.

The clock has effectively stopped ticking on their temporary layoffs. At the date six weeks following the end of the state of emergency, the clock will begin ticking for a temporary layoff, starting back at Day 1.

Q: Can I still make a claim for constructive dismissal under the common law?

Yes. The new regulation does not explicitly limit civil remedies, and allows employees to make common law constructive dismissal claims.

Section 7 of the Regulation specifically references the constructive dismissal provisions in the ESA (clauses 51(b) and 63(1)(b)). As such, the Regulation was intended to apply only to constructive language in the ESA, but not the common law.

Q: I am a unionized employee. Does this regulation apply to me?

No, the regulation only applies to non-unionized employees. Most Collective Agreements contain multiple and varied agreements which would be difficult for the Ministry to regulate effectively and accurately. If you have questions about your rights under your Collective Agreement, please contact your union representative.

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