

Employment Update: Ontario Court of Appeal: Silence is Not Condonation of Temporary Layoff

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[*Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255](#), a recent decision of the Ontario Court of Appeal, provides guidance on the topics of when an implied right of temporary layoff will be found and when a temporary layoff will be considered to have been condoned by an employee (and therefore will not result in a constructive dismissal).

BACKGROUND

Mr. Pham was a welder who began his employment with Qualified Metal Fabricators (“QMF”) in October of 2000. During his almost 20-year career with QMF, he had never previously been laid off. In March 2020, at the beginning of the global pandemic, 31 of QMF’s 140 employees, including Mr. Pham, were laid off as a result of the company’s financial losses due to the pandemic.

The initial layoff period was 13 weeks, but it was extended for “up to 35 weeks,” and subsequently extended two more times. Mr. Pham did not object to the layoffs until December 2020, when he consulted a lawyer. He ultimately brought an action for wrongful dismissal.

In response to the action, QMF brought a motion for summary judgment seeking a dismissal on the grounds that Mr. Pham condoned the layoffs, or alternatively, that he had failed to mitigate his damages by not seeking new employment.

In granting summary judgment and dismissing the claim at first instance, the motion judge held there was no genuine issue requiring a trial because QMF had an implied right to place Mr. Pham on layoff since he was aware that many of his co-workers had been laid off in the past and that, in any event, Mr. Pham had condoned the layoffs.

THE COURT OF APPEAL’S DECISION

For reasons associated with whether summary judgment was appropriate, the Court undertook its own analysis of whether there was a genuine issue requiring trial.

As described in more detail below, the Court found that (i) QMF did not have an implied right to place Mr. Pham on a temporary layoff based on past practice, and (ii) the issue of whether Mr. Pham had condoned the layoffs required a trial to determine.

Implied Terms Permitting Layoffs

The Court found that Mr. Pham's employment contract did not expressly or impliedly permit QMF to lay him off, disagreeing with QMF's position that its past practice of layoffs created an implied right to layoff. Instead, the Court reaffirmed the principle that for an implied right to layoff to exist, it must be "notorious, even obvious, from the facts of a particular situation." In this case, the fact that QMF had previously laid off Mr. Pham's co-workers did not create an implied term in Mr. Pham's employment contract that he could be laid off.

Condonation of Layoffs

In assessing the condonation issue, the Court confirmed that condonation can be a defence to a constructive dismissal action where, viewed objectively, the employer would believe at the time that the employee "consented freely to the change". Accordingly, the failure to object to a layoff does not constitute condonation. Rather, condonation in the context of a layoff requires some positive action on the part of the employee, such as express consent or expressing a willingness to return to work before claiming constructive dismissal.

In holding that there was a genuine issue requiring a trial on the issue of condonation and remitting the matter to the Superior Court for trial, the Court made several important findings:

1. Even if Mr. Pham did sign the layoff letter (a disputed fact in the case), this was merely evidence of an acknowledgement of the terms of the layoff, rather than proof of his agreement to be laid off.
2. Mr. Pham did not seek legal advice until the layoff was extended multiple times. Therefore, the legal advice he obtained could not be viewed as knowledge of the ramifications of the initial layoff or consent to the layoff.
3. There is no requirement that an employee ask when they might be called back to work from a layoff before commencing an action for constructive dismissal.

KEY TAKEAWAYS FOR EMPLOYERS

This decision provides two important reminders:

1. An employer's past practice with respect to layoffs may not constitute an implied term permitting layoffs in the future, particularly where the individual employee asserting the constructive dismissal has never previously experienced a layoff.
2. An employee's mere silence in response to a layoff will not itself be considered condonation.

Employers are well advised and reminded by this case that express terms in employment contracts permitting temporary layoffs are critical.

For specifically tailored advice, please reach out to a member of the Blaneys' [Labour and Employment Group](#).

The authors would like to acknowledge and thank articling student Tyler Matthews for his contributions to this article.

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