

SUMMER LAW JULY - AUGUST 2020 INSTITUTE



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Employment Law, Layoffs and COVID-19

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August 13, 2020



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Today's Discussion

- ➔ Briefly explore the sources of law and how laws are created in Ontario as a common law jurisdiction
- ➔ Look specifically at how employment law is responding to the massive and sudden increase in layoffs related to COVID-19



COVID-19 Workplace Impacts

- ➔ Many impacts ranging from health and safety, human rights and workplace accommodation, and job losses
- ➔ Our legal system is expected to respond to and address contemporary social and economic issues
- ➔ How do we fare when dealing with an unprecedented global pandemic?

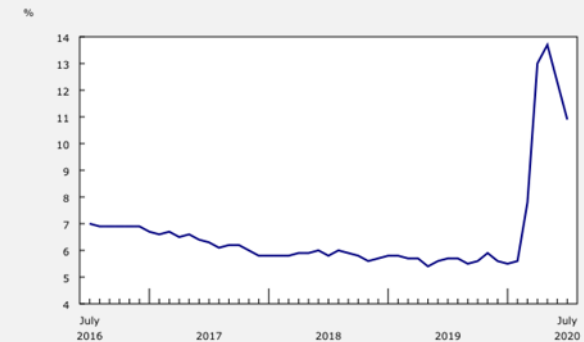


COVID-19 Workplace Impacts

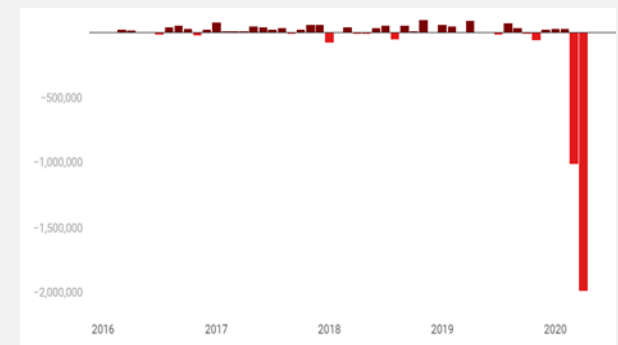
Regarding layoffs and job losses specifically, according to Statistics Canada

- In April 2020 - 2,496 percent increase in temporary layoffs in Ontario compared to the previous year (April 2019)
- In March and April - 3,000,000 job losses in Canada
- By May - more than doubling of Canada's unemployment rate from 5.6% to 13.7%
- As of now (August 2020), 8.5 million people have received CERB with the largest number (3.4 million) in Ontario

Unemployment Rates



Monthly Change to Canada's Employment



How are Laws Created and Developed When We're Not Dealing with a Global Pandemic?

- ➔ Jurisdictions like Ontario that follow the common law tradition recognize two primary sources of law: legislation and case law (developed by judges through the litigation process)
- ➔ The common law tradition was received in Ontario from England as part of the process of establishing colonial institutions with pre-existing Indigenous legal systems generally disregarded
- ➔ Legislation and case law are not exclusive domains, some legal scholars describe these two sources of law as engaging in dialogue with one another

Pre-Pandemic Approach to Temporary Layoffs

- ➔ Temporary layoffs are dealt with both under legislation and case law
- ➔ Under legislation, the *Employment Standards Act* (“*ESA*”) allows for temporary layoffs of 13 weeks within a period of 20 weeks or in some cases up to 35 weeks within a period of 52 weeks without payment of *ESA* termination and severance entitlements to an employee
- ➔ However, under the common law, unless an employer and employee have agreed that a temporary layoff in accordance with the *ESA* is permitted, a temporary layoff is generally considered to be a constructive dismissal
- ➔ Pre-pandemic, we have a relatively clear legal answer to the question, what are my rights if I am temporarily laid off?

Layoffs - Legislative and Case Law Responses

- ➔ March 17, 2020 - Ontario declares a State of Emergency
- ➔ *Emergency Management and Civil Protection Act* (EMCPA) – pre-existing emergency legislation provides the executive level of government acting through the Premier with the ability to issue emergency orders without debate or a vote of the legislature
- ➔ Order providing for closure of non-essential businesses directly precipitating layoffs
- ➔ Related economic upheaval resulting in further related economic layoffs
- ➔ Federal government rapidly created various benefit programs including CERB, CEWS and CERCA

Legislative Changes

- March 19, 2020 – Ontario legislature held an emergency session in parliament and amended the *ESA* to create a new *Infectious Disease Emergencies* leave creating a job protected leave for employees and allowing for leave without medical documentation
- May 29, 2020 – Ontario government introduced a new regulation under the *ESA*, *O.Reg 228/20, Infectious Disease Emergency Leave* which provides that non-unionized employees on temporary layoff are deemed to be on Infectious Disease Emergency Leave (retroactive to March 1, 2020)
- The result is that employees with reduced hours or wages would remain on leave with employment status, but without access to termination or severance pay entitlements under the *ESA* during the state of emergency and for six weeks after (until September 4, 2020)



Legislative Changes

- The rights of employers and employees were rapidly changed to respond to COVID-19, albeit without the same level of debate, consultation and process that one would hope for in a well functioning democracy in normal times
- Normally significant changes to the law to address social and economic issues is a slower process involving the introduction of a bill, debate, committee hearings and multiple readings



Case Law

➔ March 15, 2020 Notice to the Profession from Chief Justice suspending civil proceedings other than urgent matters commencing March 17, 2020

➔ Of note, Notice states:

“The Court will continue to hear urgent matters during this emergency period. The Court plays a fundamental role in our constitutional democracy. Access to justice for the most urgent matters must always remain available.”

➔ The distinguishing features of the common law are the reliance on precedent, the principle of stare decisis and the use of the adversarial process in court

➔ COVID is unprecedented making previous case law of limited assistance



Case Law

- ➔ The civil courts were largely suspended and will now no doubt have a back log to reckon with
- ➔ The common law develops incrementally over time
- ➔ Binding precedent comes from appellate authority
- ➔ Given that COVID-19 caused a sudden and unprecedented change, the common law will develop. Currently, this leaves a gap in the law. There is much debate and uncertainty about what the legal outcome will be under the common law for both employers and employees dealing with temporary layoffs due to COVID-19
- ➔ We may not know the answer until 2021 or 2022 perhaps one to two years after the layoffs



A Thought About the Way Forward

- ➔ Courts have made significant strides in the last few months to utilize video conferencing and electronic filing technology
- ➔ To date, the focus has been on harnessing technology to replicate what we do in the courtroom without physically being there
- ➔ We still use the same systems for dispute resolution that have been used in common law jurisdictions for many years



A Thought About the Way Forward

Supreme Court of Canada Justice Rosalie Abella wrote in an opinion in the Globe and Mail, April 24, 2020:

...

And yet, with all these profound changes over the last 114 years in how we travel, live, govern and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?

If the medical profession hasn't been afraid over the last century to experiment with life in order to find better ways to save it, can the legal system in conscience resist experimenting with justice in order to find better ways to deliver it?

Globe and Mail April 24, 2020

The question I would like to ask your students is whether we should focus on replicating what we currently do in courtrooms through the use of technology or alternatively whether we should try to imagine entirely new and better ways of resolving disputes?

Thank you to the Law Foundation of Ontario for their support of the Summer Law Institute.

