CITATION: Taylor v. Salytics Inc., 2025 ONSC 3461
BARRIE COURT FILE NO.: CV-24-00001868
DATE: 20250610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
BARRY TAYLOR	Applicant	Stephen J. Moreau, for the Applicant
– and –		
SALYTICS INC.	Respondent	Aaron Rousseau, for the Respondent
		HEARD: May 29, 2025

REASONS FOR DECISION

CHARNEY J.:

[1] The Applicant, Barry Taylor, was employed by the Defendant, Salytics Inc. ("Salytics"), for a period of approximately eleven years, from July 1, 2013 to March 25, 2024, when he was temporarily laid off by his employer.

[2] Mr. Taylor takes the position that this temporary lay-off was a constructive dismissal, and he is entitled to damages for pay in lieu of notice.

[3] Salytics takes the position that the temporary lay-off was expressly provided for in his contract of employment, and so did not amount to constructive dismissal. Since a contractual lay-off is not constructive dismissal, it is not a termination provision.

[4] Mr. Taylor takes the position that the temporary lay-off provision in his employment contract was a termination provision and was void because other parts of the termination provision did not comply with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (ESA). Since the temporary lay-off provision is void, his temporary lay-off was constructive dismissal.

[5] The primary issue in this case is whether a temporary lay-off provision in an employment contract is a termination provision, and subject to the principles set out in the Court of Appeal's decision in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158.

[6] There is no dispute that, if the temporary lay-off provision is invalid, Mr. Taylor is entitled to 6 months pay in lieu of notice, although there is some disagreement as to how that 6 months pay is to be calculated.

[7] The parties are in agreement that this case may proceed by way of Application under Rule 14.05 of the *Rules of Civil Procedure*.

Facts

[8] The relevant facts are not in dispute.

[9] Mr. Taylor first joined Salytics on July 1, 2013 as Lead Developer. In 2018, Mr. Taylor moved to the position of Senior Technical Consultant.

[10] Mr. Taylor signed his employment contract on June 24, 2013. The terms and conditions of the employment contract were divided into boxes or cells with headings. One cell was labelled "Termination", and included three separate clauses:

> Termination
>
> Salytics may terminate your employment at any time for cause.
>
> Salytics may terminate your employment without cause at any time by providing you with the minimum notice, or pay in lieu of such notice, and any severance pay required by the *Employment Standards Act, 2000* and no more except in the event a lay-off is required within the first six (6) months of your employment without cause, you will be entitled to continue receiving salary up to the end of this six month period.
>
> In the event a temporary lay-off is ever required, it may be implemented in accordance with the requirements of the *Employment Standards Act, 2000*.

[11] As of February 2024, the Applicant earned the following annual compensation:

a. Base salary of $117,300.00 ($2,255.77/week);

b. Bonus at 0-10% of base salary, based on company performance as well as individual KPIs;

c. Participation in a comprehensive group benefits plan; and

d. 4 weeks of paid vacation.

[12] During the 2024 fiscal year, Salytics experienced financial difficulties. The Respondent's revenue for Fiscal Year 2024 was down 60% from its revenue for Fiscal Year 2023.

[13] In February 2024, Salytics' President and CEO approached Mr. Taylor to ask if he would be willing to accept a temporary 20% reduction in hours, with a corresponding reduction in pay.

[14] On February 28, 2024, Mr. Taylor signed an Agreement for Reduced Hours which provided that his hours and pay would be temporarily reduced. The Agreement for Reduced Hours provided that the Applicant's total weekly working hours would be reduced from 40 hours to 32 hours per week, and that his salary would be reduced by 20%. The Agreement read "the reduced hours and salary are expected to be temporary. The reduction will continue … until the Company and Employee mutually agree to the Employee's return to full hours and salary".

[15] Mr. Taylor was concerned that refusing the reduction would result in the termination of his employment altogether. Accordingly, he accepted the reduction of hours and pay on the understanding that this was temporary and would in effect prevent the termination of his employment. His pay and hours were reduced by 20%, effective March 1, 2024. His work hours changed to 32 hours per week. His salary became $1,804.62 per week, or $93,840.00 per year.

Temporary Lay-off

[16] Unfortunately, the Respondent's financial challenges deepened, and it implemented a company-wide mandatory workweek reduction beginning April 1, 2024. Out of the Respondent's 19 employees, 6 employees (32% of the total) were placed on full temporary lay-off, with their working hours reduced to 0. Another 10 employees (52% of the total) were placed on partial temporary lay-off, with their working days reduced from 5 days to 4 days a week. Of the remaining 3 employees, 2 of them (11% of the total) already had a 4-day workweek. Only 1 employee (5% of the total), who worked in sales, was neither placed on temporary lay-off nor had a reduced workweek.

[17] Thus, only three weeks after signing the Agreement for Reduced Hours, Mr. Taylor was asked to meet with the managing partners. At this meeting, Mr. Taylor was informed that he was being placed on a temporary lay-off effective April 1, 2024. Mr. Taylor's last date of pay period ended on March 31, 2024.

[18] From April 1 to September 30, 2024, Mr. Taylor received no income from Salytics. However, his benefits were continued during this period.

[19] On July 19, 2024, Mr. Taylor commenced this Application, seeking a declaration that he was dismissed from his employment at Salytics and seeking damages in lieu of 12 months notice.

[20] In June and July 2024, the Respondent began to recall some employees back to work as more work became available. On September 6, 2024, the Respondent sent a recall notice

to the Applicant for return on a full-time basis. The Recall Notice advised the Applicant that:

a. The Applicant will be returning to the same position of Senior Technical Consultant, with the same duties as prior to the lay-off.

b. If the Applicant agrees, when he returns, he will be working 40 hours per week (5 days per week), Monday to Friday, back to his annual rate of $117,300.00, rather than the 20% reduction to $93,840.00 that began March 1, 2024.

c. The Applicant will return on September 12, 2024

[21] Following some discussions, on September 25, 2024, the Respondent also provided the Applicant with a revised employment agreement (the "Revised Agreement"), at his request. The Revised Agreement removes the Temporary Lay-off Provision. It confirms that service will count from the Respondent's original start date, being July 1, 2013.

[22] On September 30, 2024, Mr. Taylor returned to working full-time at Salytics in his prior role. His compensation is the same as it was prior to the temporary reduction in hours and pay.

[23] Mr. Taylor was without income for a period of six months – from April 1, 2024 to September 30, 2024.

Analysis

[24] At common law, an employer has no right to lay off an employee. "Absent an express or implied term in an employment agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment contract that constitutes constructive dismissal... This is so, even where the layoff is temporary…In such cases, an employee has an immediate right to pursue a claim for constructive dismissal: *Pham v. Qualified Metal Fabricators*, 2023 ONCA 255, at para. 29 (citations omitted).

[25] The Respondent takes the position that the temporary lay-off was made in accordance with the ESA and an express term in the signed 2013 Employment Agreement. As the employer, Salytics had a contractual right to put the Applicant on a temporary lay-off. The employer exercised its contractual right and put the Applicant on temporary lay-off in accordance with the ESA. Salytics did not unilaterally change the contract with the Applicant. The Applicant was, therefore, not constructively dismissed.

[26] There is no dispute that if the lay-off provision of the employment contract is valid, Mr. Taylor was not constructively dismissed and he would have no claim for damages in lieu of notice.

[27] Mr. Taylor, however, takes the position that the lay-off provision was a "termination clause", and, for the reasons explained below, was void and unenforceable.

[28] As indicated above, there is no dispute that if the lay-off provision of the employment contract was void, Mr. Taylor was constructively dismissed and is entitled to six months damages in lieu of notice.

Termination Clauses in Employment Contracts

[29] The law regarding the interpretation of termination clauses in employment contracts was summarized by Laskin J.A. at para. 28 of *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481. In *Waksdale v. Swegon North America Inc*., 2020 ONCA 391, the Court of Appeal emphasized the following points from that summary:

> - The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so…
>
> - Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship…

[30] In *Wood*, the Court held that the enforceability of a termination provision in an employment contract must be determined as at the time the agreement was executed. The wording of the contract alone should be considered in deciding whether it contravenes the *ESA*, not what the employer might have done on termination: *Wood*, at paras. 43-44. Thus, even if an employer's actions comply with its *ESA* obligations on termination, that compliance does not have the effect of saving a termination provision that violates the *ESA*.

[31] In *Waksdale*, the Court of Appeal held that the employment agreement must be interpreted as a whole and not on a piecemeal basis, and the court will not enforce a termination clause if it is in whole or in part illegal. The Court stated, at para. 10:

> An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant

> whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked.

[32] The Court of Appeal has repeatedly held that if a termination provision in an employment contract violates the ESA all the termination provisions in the contract are invalid: *Rahman v. Cannon Design Architecture Inc*., 2022 ONCA 451, at para. 30.

[33] The parties agree on these legal principles.

[34] The Applicant argues that both the termination "for cause" (clause 1) and the termination "without cause" (clause 2) provisions of the 2013 employment contract are inconsistent with the ESA, and therefore all the termination provisions in the employment contract are invalid.

[35] The Respondent concedes that the termination "for cause" provision in the 2013 employment contract is invalid, and as such all the termination provisions in the contract are invalid.

[36] Where the parties diverge is on the question of whether the lay-off provision qualifies as a termination provision.

[37] The Applicant points first to the inclusion of the lay-off provision within the cell labelled "Termination". This appears to be a recognition by the employer that the lay-off provision falls within this category.

[38] The Applicant further argues that, at common law, a lay-off is a constructive dismissal, and therefore a termination. The Applicant argues that the common law draws no distinction between the two: an employer cannot terminate or lay off an employee unless it gives prior reasonable notice.

[39] The Applicant also relies on the organization of the ESA. Part XV of the ESA is labelled "Termination and Severance of Employment", and the relevant parts of s. 56 define termination as follows:

> **What constitutes termination**
>
> 56 (1) An employer terminates the employment of an employee for purposes of section 54 if,
>
> (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

Temporary lay-off

(2) For the purpose of clause (1) (c), a temporary layoff is,

(a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,

(i) the employee continues to receive substantial payments from the employer,

(ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits,

(iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

(v) the employer recalls the employee within the time approved by the Director, or

(vi) in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

Temporary lay-off not termination

(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off.

[40] The Applicant argues that s. 56(1)(c) provides that a lay-off amounts to termination unless it is "temporary" as outlined in s. 56(2).

[41] The Respondent agrees that if the termination provisions in an employment agreement are unlawful in any respect, then the termination provisions taken as a whole are unlawful and unenforceable. But an unlawful termination provision does not invalidate any other provision in an employment agreement.

[42] The Respondent argues that the placement of the lay-off provision in the cell labelled "Termination" is not determinative of its identification as a termination provision. The Respondent argues that this formalistic approach was rejected by the Court of Appeal in *Waksdale*, which held that whether a clause qualifies as a termination provision depends on the substance of the provision, not its placement in the contract. In *Waksdale*, the Court was confronted with termination provisions contained in two different sections of an employment agreement, one dealing with termination without cause and one dealing with termination for cause. The Court concluded, at para. 10:

> While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked.

[43] In other words, *Waksdale* stands for the proposition that the location of the termination provision in the contract does not matter. The Court is to examine the substance of the clause, not where it appears in the employment contract. This principle works both ways: an employer cannot avoid its legal obligations by placing a termination provision under a different heading, nor does a provision that is not a termination provision become one because of where it is placed. It is the substance that matters, not the form.

[44] The Respondent also relies on the ESA, and argues that s. 56(4) expressly provides that a temporary lay-off is not a termination. In the present case, Mr. Taylor was recalled after 6 months, and there is no dispute that, assuming the validity of the lay-off provision in the employment contract, his lay-off qualified as a temporary lay-off under the ESA.

[45] Finally, the Respondent also relies on the Court of Appeal's decision in *Kopyl v. Losani Homes (1998) Ltd.*, 2024 ONCA 199, where the Court considered whether a one-year fixed contract qualified as a termination provision, since the employee was discharged at the end of the contract. Interestingly, in this case it was the employer who argued that the fixed term contract qualified as a termination provision. While unusual, the characterization of a contract term cannot depend on the identity of the party seeking to challenge its validity.

[46] The Court concluded that the invalidity of a termination clause in the employment agreement did not invalidate the fixed term provision, because a contractual provision providing for a fixed term of employment was not a termination clause since, upon the expiry of said fixed term, the employment relationship automatically terminates. The Court

held that *Waksdale* did not suggest "that the invalidity of the termination clause in an employment contract had the effect of converting a fixed term contract into one terminable on reasonable notice".

[47] The analysis in the present case presents something of a "chicken and egg" conundrum. If the layoff provision in the Employment Agreement is valid, the lay-off was not a termination because it was authorized by the contract. If the lay-off provision is invalid, the lay-off was not authorized, and it is a termination. But whether the lay-off provision is invalid depends on whether a lay-off is a termination.

[48] I agree with the Respondent that the placement of the lay-off provision under the Termination heading cannot be determinative of whether it is a termination clause. Otherwise, an employer could change the outcome simply by rearranging the headings in the contract. That would be inconsistent with the principle decided in *Waksdale* that the characterization of the provision does not depend on its placement, and the court must focus on the substance rather than the form. The placement of the provision is irrelevant, the issue is not where in the employment contract the provision is found, but whether it is, in substance, a termination provision.

[49] The fact that a unilateral lay-off by an employer constitutes constructive dismissal at common law, does not make a lay-off provision in an employment contract a termination provision. A lay-off is a termination when there is no clause in the agreement permitting the employer to lay-off the employee. When there is such a clause, the lay-off is not a constructive dismissal, and therefore not a termination. As the Supreme Court of Canada stated in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, at para. 37:

> If an express or an implied term gives the employer the authority to make the change, …the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal.

[50] The lay-off provision in the contract may well be, from the employee's perspective, a rights-restricting provision, but it is not a termination provision.

[51] No argument was made that the lay-off provision in the 2013 employment contract is, standing by itself, inconsistent with the ESA.

[52] Finally, I am also bound by the definitions in s. 56(4) of the ESA, which specifically provides that a temporary lay-off is not a termination.

[53] Based on the foregoing analysis, I conclude that the lay-off provision in the 2013 employment contract is not a termination provision, and is therefore not invalid. As such, the Applicant was not constructively dismissed when he was laid off in accordance with that provision.

Alternative - Calculation of damages

[54] If I am incorrect in my conclusion that the lay-off of the Applicant was not a constructive dismissal and therefore not a termination, I will calculate the damages.

[55] Both parties agree that if the Applicant was constructively dismissed, he would be entitled to pay in lieu of six months notice. The Applicant would argue for a longer period, but since he returned to work on September 30, 2024 at full pay, he acknowledges that he has no damages after that date. As such, his damages are limited to the period of April 1, 2024 to September 29, 2024.

[56] The primary issue in dispute is whether the Applicant would be entitled to damages based on his pay at his base salary of $117,300.00 ($2,255.77/week) or at the reduced salary he had agreed to accept immediately before he was laid off - the 20% reduction to $93,840.00 ($1,804.62 per week) that began March 1, 2024.

[57] Mr. Taylor's remuneration at Salytics consisted of a base salary, benefits, and bonus. His benefits were continued during the lay-off period, and none of the Salytics employees received bonuses the year of the lay-off. As such, Mr. Taylor seeks 6 months salary at his base salary rate of $117,300, or $58,650.

[58] The Applicant argues that it would be improper to pay him at a reduced rate during the notice period for two reasons. First, the reduction does not accurately reflect his true salary and paying a reduced salary during the statutory notice period contravenes ss.60 (1) and (2) of the ESA, which provide as follows:

> 60 (1) During a notice period under section 57 or 58, the employer,
>
> > (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;
> >
> > (b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and
> >
> > (c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.
>
> (2) For the purposes of clause (1) (b), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employer shall pay the employee an amount equal to the average amount of regular wages earned by the employee per week for the weeks in which the employee worked in the period of 12 weeks immediately preceding the day on which notice was given.

[59] These sections require employers to maintain an employee's salary during a notice period.

[60] Second, the Applicant argues that it would be improper for the employer to rely on the reduced salary rate when the only reason Mr. Taylor accepted the reduced rate was to protect his job and the parties agreed that this reduction was meant to be temporary. It would be improper to permit the employer to rely on the reduced wage rate when the employee was laid off only three weeks after signing the Agreement for Reduced Hours.

[61] The Respondent argues that the reduced salary of $1,804.62 per week is the correct rate to calculate the Applicant's damages, if any. Had the Applicant worked through the Temporary Lay-off Period, he would have worked reduced hours, with a reduced salary of $1,804.62 per week.

[62] The Respondent argues that the purposes of damages in lieu of reasonable notice is to put employees in the position they would have been in had they continued to work through to the end of the notice period. Since the Applicant would not have earned full salary during the notice period or Temporary Lay-off Period, damages in lieu of reasonable notice should not put him in a better position.

[63] The calculation, based on his reduced salary, is $46,559.20 ($1,804.62 x 26 weeks [6 months] = $46,920.12; minus one working day [$360.92])

[64] If he was terminated, Mr. Taylor would also be entitled to vacation pay accrual during the statutory notice period of eight weeks. The Applicant calculates his vacation pay entitlement on the basis of his unreduced base salary as follows: 8% of his gross salary over a period of seven (7) weeks, for a total of $1,263.23 ($117,300 / 52 x 7 x 0.08).

[65] Mr. Taylor therefore claimed damages as follows: (a) $58,650 in lost salary; and, (b) $1,263.23 in accrued vacation pay during the statutory notice period.

[66] The Respondent argues that if the Court found that the Applicant was constructively dismissed, and that he was owed termination pay under the ESA, per s. 35.2(b) of the ESA he is only entitled to vacation pay calculated at a rate of 6%, not 8%. This sum, on the Applicant's reduced salary of $1,804.62 per week, is $757.94.

[67] Section 35.2(b) of the ESA provides:

> 35.2 An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34, equal to at least,
>
> (a) 4 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is less than five years; or
>
> (b) 6 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is five years or more.

[68] Were I to have found constructive dismissal in this case, I would have calculated the Applicant's pay in lieu of notice based on his pay at his base salary of $117,300.00 for the reasons set out in the Applicant's submissions. While I am not doubting the employer's good faith when it asked Mr. Taylor to agree to a 20% reduction in hours and salary just three weeks before he was laid off, an employer cannot circumvent its ESA obligation for pay in lieu of notice by asking the employee to agree to reduced pay in exchange for not being laid off, and then use that agreement to reduce his statutory entitlement to pay in lieu of notice if the employee is terminated. This would be inconsistent with the spirit and intent of s. 60(1) of the ESA.

[69] Section 35.2(b) of the ESA provides that vacation pay is calculated at 6%.

[70] Accordingly, if I am not correct in my conclusion that the lay-off of the Applicant was not a constructive dismissal and therefore not a termination, I would have calculated his pay in lieu of damages as follows: a) $58,650 in lost salary; and, (b) $947.42($117,300 / 52 x 7 x 0.06). in accrued vacation pay during the statutory notice period.

Conclusion

[71] For the foregoing reasons, the Application is dismissed.

[72] The parties have agreed that the successful party to this Application shall be awarded costs in the amount of $15,000, inclusive of HST.

Justice R.E. Charney

Released: June 10, 2025

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– and –

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Respondent

REASONS FOR DECISION

Justice R.E. Charney

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