CITATION: Webb v. SDT North America, 2023 ONSC 7170
COURT FILE NO.: CV-20-00000072-0000
DATE: 20231219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JAMES SEAN WEBB	)	Puneet Tiwari, for the Plaintiff
Plaintiff	)	
– and –	)	
SDT NORTH AMERICA	)	John W. Montgomery, for the Defendant
Defendant	)	
	)	**HEARD:** June 12, 2023, with further written submissions delivered September 8, 2023, and September 29, 2023

REASONS FOR DECISION

FRASER J.:

I. Nature of the Motion

[1] The Plaintiff moves for summary judgment with the agreement of the Defendant that summary judgment is the most appropriate method for the adjudication of this matter.

[2] This motion arises out of a layoff that occurred shortly after the declaration of the global COVID-19 pandemic (the pandemic) in March, 2020.

[3] On Sunday, March 22, 2020, the Plaintiff was told by his employer to stay home from work. On March 25, 2020, he received his Record of Employment recording the layoff and he began inquiring when he might return to work. The Plaintiff was one of six persons laid off, two of whom were eventually recalled.

[4] The Defendant was later deemed an essential service. On May 6 and 7, 2020, the Plaintiff reached out to the Defendant to determine when he would be called back. He received no information about when he would be recalled. The Plaintiff retained legal counsel believing himself to be constructively dismissed.

[5] It is well-established that an employer has no right to unilaterally lay off an employee unless the contract provides to the contrary. The Plaintiff asserts that there was no provision in the employment contract that contemplated a layoff and that, as a result, he was constructively dismissed and is entitled to damages.

[6] The Defendant argues that the Plaintiff's layoff should be designated an Infectious Disease Emergency Leave ("IDEL") and that that negates any claim of constructive dismissal.

[7] The Plaintiff submits the IDEL regulations do not preclude an action in the common law for constructive dismissal.

[8] The Plaintiff had no written agreement setting out the terms of the employment contract. The motion raises the question of whether the employment contract contains a term that contemplates layoff in the specific context of government-imposed restrictions in the wake of the global pandemic declared in March, 2020.

[9] The Defendant submits that I should consider the issue of the pandemic both when evaluating the implied terms of the employment contract and the issue of constructive dismissal.

[10] The Defendant asserts that to do justice between the parties, I should find that it is implicit in the oral contract of employment that, in the specific circumstances of a global emergency and government-imposed restrictions on the economy, a temporary layoff would be reasonable and could be imposed.

II. Issues

[11] The issues on this motion are as follows:

a. Is this matter appropriate for summary judgment?

b. What was the nature of the Plaintiff's employment?

c. Does the Plaintiff's situation fall within the scope of the IDEL exemption created on May 29, 2020, by section 7 of O.Reg. 228/20 under the *Employment Standards Act, 2000* (*ESA*)?

d. What is the impact of an IDEL on a common law claim of constructive dismissal?

e. Was the Plaintiff constructively dismissed?

f. If so, what are the Plaintiff's damages?

III. Analysis

A. Is This Matter Appropriate for Summary Judgment?

[12] It is well understood that summary judgment is appropriate where there is no genuine issue for trial. It is appropriate to proceed by way of summary judgment where a judge can make the necessary findings of fact, apply the facts to the law and where the summary judgment procedure is a proportionate, more expeditious and less expensive means to achieve a just result.

[13] Both parties agree that this matter can be determined by way of summary judgment, as do I. The communications between the parties around the layoff occurred by way of text message exchange. The timing of the pandemic and introduction of the IDEL regulation are not contested. I find that summary judgment is the proportionate, most expeditious and least expensive means by which to achieve a just result. (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 47, 49)

B. Nature of the Plaintiff's Employment Contract

[14] SDT supplies specialized equipment to customers located throughout Canada, and in the United States, the Middle East, Asia, India, and Latin America. It provides remote software and technical support, and on-site services, including training, data collection and analysis. In January 2020, SDT employed 16 employees in Canada and 4 employees in the United States. The equipment is manufactured outside Canada. Its headquarters are located in Cobourg, Ontario.

[15] The Plaintiff was an employee of SDT for over 13 years at the time that he was laid off on March 25, 2020, the date that his Record of Employment records the layoff. He was 55 years old at the time of the layoff.

[16] The Defendant describes the Plaintiff's responsibilities as relating to shipping and receiving. He also had limited customer support duties involving common customer support issues, referring them on to technical staff where the problem was outside the scope of his experience. The Plaintiff's affidavit details more specifics about the role which included logistics and export responsibilities.

C. Does the Plaintiff's Situation Fall Within the Scope of the Infectious Disease Emergency Leave ("IDEL") Exemption Created on May 29, 2020, by Section 7 of O.Reg. 228/20 Under the Employment Standards Act, 2000 (ESA)?

[17] The Defendant asserts that the Plaintiff was placed on IDEL. I must examine whether s. 7 of O.Reg. 228/20 applies. In short, was the reduction in the Plaintiff's hours for reasons related to the designated infectious disease?

[18] The Plaintiff asserts that his layoff was not related to COVID-19 and that IDEL does not apply. In support of this argument, he notes that SDT did not lay off all of its staff, was deemed an essential service, and remained in operation throughout the pandemic.

(i) Facts Relating to Layoff

[19] On Sunday, March 22, 2020, the Plaintiff was advised by his employer that the company was going to a skeleton staff and asked him to stay home until further notice. The Plaintiff replied, “see you in a week”.

[20] Aspects of SDT’s work would later be deemed an essential service and the company was not shut down during the pandemic, although it appears that the shipping and receiving and well as the sales were significantly curtailed.

[21] On March 25, 2020, Mr. Webb and Mr. Rienstra exchanged further texts including the following:

> Mr. Webb: I understand, I am more fortunate than others actually we all are so I think we can make it through this.
>
> Mr. Rienstra: Linda and I are asking some of you to apply for EI until this virus blows itself out and there is enough work for you to come back.

[22] On March 27, 2020, the Plaintiff was contacted by a representative of SDT who inquired whether he would be willing to return to work. The Plaintiff stated that he was, but he was never recalled.

[23] Also on March 27, 2020, the Plaintiff had this exchange with Mr. Rienstra:

> Mr. Rienstra: Linda and I are really sad and sorry about the layoffs. We never believed something like this could happen to our company and our extended family.
>
> Mr. Webb: Unfortunately we are not all knowing and still vulnerable human beings this whole pandemic blind side all of us.
>
> Mr. Rienstra: Thanks for understanding.
>
> Mr. Webb: We cannot lay blame on anyone for this, we all still have our health and eventually happiness.
>
> Mr. Rienstra: Great attitude mate. Let me know if you need something.
>
> Mr. Webb: It will return to somewhat of normal in the future I expect.

[24] On the same day, the Plaintiff spoke to another employee who had not been laid off and who told him that he was “stupid busy”. The Plaintiff asks that I infer that there was no shortage of work and that the pandemic did not interfere with the business operations of the Defendant.

(ii) Analysis of Layoff

[25] It is clear from those exchanges and the ones that followed that the Plaintiff did not want to be laid off. It appears that while he accepted it as an inevitable result of the impact of the pandemic, he wanted to work, and he was looking for assurances to return. In my view, it is not fair to construe his words as consent.

[26] However, nothing in the evidence points to any ulterior motive for the layoff, including the assertion that in early March when the company moved to new premises that he was given old furniture, rather than the new furniture that other employees received. The messages exchanged and the fact that others were laid off point to the Plaintiff's layoff being a direct result of the pandemic, notwithstanding that much of the business operations continued.

[27] For these reasons, I find that the layoff was for reasons related to the COVID-19 pandemic and can be construed as IDEL.

D. Impact of IDEL on the Common Law

[28] Communication ceased between the Plaintiff and the Defendant on May 7, 2020, and on June 3, 2020, the Plaintiff's counsel wrote to SDT asserting constructive dismissal.

[29] Section 8 of the *ESA* provides that, subject to s. 97 of the *ESA*, no civil remedy is affected by the *Act*. Section 97 is not applicable.

[30] This Court has held that the IDEL provisions do not preclude a common law claim for constructive dismissal (see *Fogelman v. IFG*, 2021 ONSC 4042 at paras. 46-48 and *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076, at paras. 43-44, 46). Both decisions held that IDEL applies to constructive dismissal within the meaning of the *ESA* and that the IDEL regulation does not affect a claim for constructive dismissal at common law. Each decision relied on the language of s. 8 under the *ESA*.

[31] I agree with and adopt that analysis. Therefore, although the layoff meets the definition of IDEL, the Plaintiff maintains a common law right to sue for constructive dismissal.

E. Constructive Dismissal and Implied Term Permitting Layoffs

(i) Principles of Constructive Dismissal

[32] In *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, the Court of Appeal for Ontario set out the general principles of constructive dismissal and the implied term permitting layoffs as follows at paras. 28-35:

> [28] Constructive dismissal can be established by either (i) the employer's breach of an essential term of the employment contract, or (ii) a course of conduct by the employer that establishes that it no longer intends to be bound by the employment contract: *Potter v. New*

> *Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at paras. 37-43.
> [29] 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: *Elsegood v. Cambridge Spring Service (2001) Ltd*., 2011 ONCA 831, at para. 14. This is so, even where the layoff is temporary: *Stolze v. Addario* (1997), 1997 CanLII 764 (ON CA), 36 O.R. (3d) 323, 35 C.C.E.L. (2d) 109 (C.A.).
>
> [30] In such cases, an employee has an immediate right to pursue a claim for constructive dismissal: *Coutinho v. Ocular Health Centre Ltd*., 2021 ONSC 3076, 71 C.C.E.L. (4th) 57, at para. 55.
>
> [31] Where the employment contract has no express term concerning lay offs, a right that an employer may do so will not be readily implied. The fact that a co-worker had been previously laid off does not create a legal basis for the employer to impose a layoff on the employee. "The right to impose a layoff as an implied term must be notorious, even obvious, from the facts of a particular situation": *Michalski v. Cima Canada Inc*., 2016 ONSC 1925, at para. 22.
>
> [32] Sections 56(1)(c) and 56(2) of the ESA give an employee who has been laid off, 35 weeks to "wait and see" if they will be recalled before electing termination and/or severing the employment relationship by pursuing a claim for constructive dismissal. A layoff exceeding 35 weeks is a deemed termination of employment: *Elsegood*, at paras. 16-24. The statutory 35-week temporary layoff period under ss. 56(1)(c) and 56(2) is a "minimum standard": *Elsegood*, para. 21.
>
> [33] The ESA does not displace greater contractual or common law rights and protections: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at para. 25; *Miranda v. Respiratory Services Limited*, 2022 ONSC 6094, at para. 60, citing ESA, ss. 5(2) and 8(1). The fact that a layoff was conducted in accordance with the ESA "is irrelevant to the question of whether it is a constructive dismissal": *Bevilacqua v. Gracious Living Corporation*, 2016 ONSC 4127, at para. 9.

[33] The Court of Appeal was not faced with an IDEL argument and did not consider the impact of the IDEL regulations.

(ii) Condonation

[34] In *Pham*, the Court of Appeal also considered an argument that the employee acquiesced or condoned the layoff. In addressing this argument, the Court examined whether there was

an implied term permitting layoffs. The employer argued that it had the implied right to layoff employees because it had done so in 2009. The Court of Appeal rejected that past practice resulted in an implied term in that case.

[35] As for condonation, the Court held at para. 52 that whether an employee objected to fundamental change in the agreement within a reasonable period of time is a fact-specific determination and that an employee is permitted a reasonable period of time to assess contractual changes before they are forced to take an irrevocable legal position.

[36] Silence is not equivalent to condonation during these reasonable periods: *Pham, supra,* at para. 55. Condonation or acquiescence must be expressed. There must be positive action that would lead the employer to believe that the employee consented to the terms of employment.

(iii) Application to the Facts

[37] I have outlined above that I find that the Plaintiff was laid off without his consent. It is clear that at all times he wanted to be working. I also find that the remarks, made in the early days of the layoff and the pandemic, are not determinative because the Plaintiff did not have a reasonable opportunity to assess the change in his employment. Once he did have an opportunity to assess the situation, he obtained legal advice and pursued his claim of constructive dismissal, all within a matter of weeks of the layoff.

[38] In examining the implied terms of the contract, I must assess what the parties would have agreed to when forming the contract, had they turned their minds to the type of situation which later transpired. *Mifsud v. MacMillan Bathurst Inc*., 1989 CanLII 260 (ON CA) at para. 18. There, the Court of Appeal cautioned that, a term should not be implied unless it represents the intention of the parties. As noted above in *Pham,* where the employment contract has no express term concerning layoffs, a right that an employer may do so will not be readily implied.

[39] The Defendant submits I should find that it is implicit in the oral contract of employment that, in the specific circumstances that faced the parties in Spring 2020, a temporary layoff would be reasonable and could be imposed.

[40] There is no basis for me to so find. The Defendant asked the Plaintiff to stay home and then laid him off. Mr. Rienstra did not tell the Plaintiff how long the layoff would be. He continued to employ others and the business was deemed an essential service. I do not think such a term can be implied in the circumstances.

[41] I find therefore that the contract did not contain an implied term permitting a layoff in these circumstances and that the Plaintiff did not acquiesce or condone the layoff. As a result, I find that the Defendant constructively dismissed the Plaintiff on March 25, 2020, the date reflected in the Record of Employment.

F. Damages

[42] There is no existing termination agreement and so I must determine damages by assessing the appropriate notice period and assessing the income the Plaintiff would have earned. The Plaintiff submits 17 months is the appropriate notice period. In support, he notes that he was 55 at the time of the layoff and he earned a base salary of $55,749.00. He works in a small town and has had, and will continue to have, difficulty finding work and similar employment. The cases provided by the Plaintiff suggest that a 15 to 18 month notice period is appropriate in similar circumstances.

[43] The Defendant submits that the proper notice period is 10 months, citing that Mr. Webb had no supervisory roles.

[44] His work involved shipping, receiving and logistics. Mr. Webb is older, he provided some customer support and was an employee of 13 years. He was responsible for the paperwork for export and the export of goods from head office to destinations around the world. He provided some software support and performed repairs and calibrations on devices. I find the appropriate notice period to be 15 months.

[45] The Plaintiff is therefore entitled to 15 months notice at his base salary of $55,749.00, less $3,700.50 that the Plaintiff earned through part-time work between November, 2020 and May, 2021. The Plaintiff commenced a new job on May 17, 2021, earning $40,000 per year. His damages will be reduced by the income earned in these periods.

[46] The Plaintiff also claims $500.00 as the typical annual raise. I do not find the evidentiary support to award damages for this claim. The Plaintiff does not specifically address it in his affidavit and the T4 slips provided do not demonstrate that such a raise was predictable. I also have insufficient evidence to make an award for the loss of benefits.

[47] The Plaintiff is entitled to 6% of his gross salary as vacation pay.

[48] I therefore calculate the Plaintiff's damages as follows:

- Fifteen months notice at base salary ($55,749/12 mo. X 15 mo.) + vacation pay at 6% of ($55,749/12 X 15), less $3,700.50 for income from part-time work less differential for the new employment which commenced May 17, 2021 ($55,749/12 - $40,000/12).

- The resulting calculation is: $69,686.25 + $4,181.18 - $3,700.50 - $1,312.42 = $68,854.51.

[49] I therefore find that the Plaintiff is entitled to damages in the amount of $68,854.51.

IV. Conclusion

[50] Based on the evidence, I find that Mr. Webb has proven that he was constructively dismissed at common law. I grant summary judgment on this motion. I assess his damages as calculated above in the amount of $68,854.51.

[51] The Plaintiff is entitled to pre-judgment interest under the *Courts of Justice Act,* R.S.O. 1990, c. C.43 from March 25, 2020, and post-judgment interest in accordance with the *Courts of Justice Act.*

[52] The Plaintiff has been successful and is presumptively entitled to his costs. I urge the parties to resolve costs. If they are unable to do so, the Plaintiff shall provide a two-page double-spaced costs submission, together with a Bill of Costs, by January 10, 2024, and the Defendant shall provide any response by January 17, 2024. Each may be forwarded to my Judicial Assistant at Robyn.Pope@ontario.ca.

[53] I thank the parties for their assistance with this matter.

Justice S.E. Fraser

Released: December 19, 2023

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMES SEAN WEBB

Plaintiff

– and –

SDT NORTH AMERICA

Defendant

REASONS FOR DECISION

Justice S.E. Fraser

Released: December 19, 2023