



What's New in HR Law

Court of Appeal Narrows the Implied Right to Lay-off and Clarifies Condonation

June 5, 2023 | By [Mark Van Ginkel](#)

Bottom Line

In [Pham v Qualified Metal Fabricators Ltd, 2023 ONCA 255](#), the Court of Appeal reached two conclusions that are relevant to Ontario employers: (1) the lay-off of some employees does not generally constitute an implied right to lay off other employees; and (2) in order for an employee to condone a lay-off, they must have engaged in some positive action (not just silence or acquiescence).

Background Facts

In March 2020, Qualified Metal Fabricators Ltd. (the “Employer”) laid off the Appellant and 30 other employees as a result of the COVID-19 pandemic. At the time, the Employer explained to the Appellant that the lay-off was temporary and that it hoped to recall him in June 2020.

The Appellant’s lay-off was extended multiple times and, in December 2020, was extended through to September 2021. Relying on a regulation under the *Employment Standards Act, 2000* (namely, O. Reg. 228/20), the Employer retroactively deemed its laid-off employees to be on an Infectious Disease Emergency Leave.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

After the December 2020 extension, the Appellant consulted a lawyer and filed a claim for wrongful dismissal.

A motions judge with the Ontario Superior Court of Justice granted summary judgment (i.e., judgment without a full trial), dismissing the Appellant's wrongful dismissal claim. This decision was appealed to the Court of Appeal on the grounds that:

- the motions judge failed to assess whether summary judgment was appropriate;
- the motions judge incorrectly found that there was an implied agreement to lay off the Appellant because other employees had been laid off in the past; and
- the motions judge incorrectly decided that the Appellant condoned the lay-off.

The Court of Appeal Decision

The Court of Appeal sided with the Appellant on each of the three grounds of appeal and remitted the action back to the Ontario Superior Court to be heard at trial. Of particular interest to Ontario employers are the Court of Appeal's comments as relating to the implied right to lay-off and the condonation of lay-offs.

Implied Right to Lay-off

The Court of Appeal noted that since the Appellant's terms of employment did not expressly permit the employer to lay him off, the question before the motions judge was whether there was an implied term in the agreement permitting it. The employer argued that it had an implied right to lay off the Appellant due to its past practice of laying off employees in 2009. The employer also argued that most of the other employees who had been laid off in March 2020 were already recalled by September 2020, which suggested that the Appellant was "undoubtedly aware" that he would similarly be recalled.

The Court of Appeal rejected these arguments, stating that the laying off of other employees did not necessarily constitute an implied term of lay-off in the Appellant's employment contract. That said, the Court recognized that an employer's past practice of lay-offs had been considered by other courts when deciding whether the right to lay off an employee was implied.

Condonation of Lay-off

The Court of Appeal also considered whether the Appellant may have condoned his lay-off and therefore given up on his right to assert constructive dismissal.

The Employer had given a lay-off letter to the Appellant when he was placed on lay-off. Although there was a signature next to his name, the Appellant later denied having signed the letter. Nevertheless, the Court of Appeal assumed that the Appellant had signed the lay-off letter at the time it was issued and had not objected to the lay-off until several months after it was implemented.

However, the Court of Appeal rejected any suggestion that the Appellant condoned the layoff. The Court held that silence during a period when an employee is not actively at work (such as during a lay-off) is not indicative of condonation. Instead, there must be a positive action by the employee in order for them to have condoned a lay-off – e.g., expressed consent to the lay-off, expression of a willingness to work, etc.

Check the Box

Although there are circumstances where the right to lay-off can be implied, the Court of Appeal's decision clarifies that such circumstances are relatively narrow. Employers should not assume that a right to lay-off is established by a past practice of laying off employees. Moreover, employers should not assume that an employee has condoned a lay-off merely because they have not objected to it.

To avoid the risks that arose in this case, prudent employers should include an explicit lay-off clause in their employment agreements if they wish to have a right to lay off employees. Any such clause should be worded with clear, well-drafted language.

Need More Information?

For more information or assistance with employment terminations and layoffs, contact [Mark Van Ginkel](#) at mvanginkel@filion.on.ca or your regular lawyer at the firm.



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