



What's New in HR Law

Damage Control: How to Reduce Liability Following a Constructive Dismissal

February 26, 2019

BOTTOM LINE

An employer saved itself more than \$100,000 in damages by offering to recall a long-time employee early on in the reasonable notice period following a constructive dismissal.

Facts: Employee sues after being temporarily laid off

The employee, David Gent, had worked for Strone Inc. for 23 years when he was temporarily laid off due to a lack of work.

Two weeks after the layoff, the employee's counsel wrote to Strone asserting that the temporary layoff was a constructive dismissal. Strone responded that there was a possibility it would recall the employee to work.

The employee's counsel immediately replied by email that the employee would not be returning. The email stated that the employee did not trust Strone, that he felt the relationship had broken down, and that he would be suing Strone.

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Just two weeks later, Strone did in fact recall the employee to active employment. In the letter, sent by Strone's counsel, Strone assured the employee that he was being recalled to perform work consistent with past work. Strone also assured the employee that it considered him to be a valued employee and that it would treat him normally with no reprisals or hard feelings.

When Strone's counsel followed up two days later to find out whether the employee would be returning to work, the employee's counsel replied that he would not. The employee then proceeded with his lawsuit against his former employer.

Decision: Temporary lay-off was a constructive dismissal, but employee failed to mitigate

The court found that Strone had constructively dismissed the employee because the employment contract did not give Strone the right to lay off the employee.

In ordinary circumstances, the employee would have been entitled to compensation reflecting a reasonable notice period of 18 months.

However, the court found that the employee had failed to mitigate his losses by refusing to return to work when Strone recalled him. As a result, the employee was entitled to compensation for only 3.5 weeks – the period between the date he was laid off and the date he was offered re-employment.

In reaching its decision, the court found that the employee had no intention of accepting work, regardless of the circumstances. While the employee had already initiated litigation by the time Strone had recalled him to work, it would have still been reasonable for the employee to at least consider Strone's offer.

The court's conclusion was supported by evidence that the long-standing employment relationship had been harmonious and amicable before the layoff. The employee also testified that he had no issues with his superior, that Strone was a good workplace, and that he enjoyed working for Strone.

Check the Box

This decision highlights the importance of timely and effective damage control. It also signals the benefit of avoiding a total breakdown in the employment relationship once an employee has asserted that he or she has been constructively dismissed.

By offering to recall the employee early on in the reasonable notice period, Strone was able to avoid more than \$100,000 in damages.

If Strone had responded to the employee and his counsel in an overly antagonistic manner, it may have been reasonable for the employee to refuse the recall, and the outcome of the case may well have been very different.

Decision Date: January 9, 2019

Forum: Ontario Superior Court of Justice

Citation: *David Gent v. Strone Inc.*, 2019 ONSC 155

Need more information?

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