

TOP STORIES

Timeline of Nova Scotia mass shooting

APRIL 19 **UPDATED**



NINE TO FIVE

I think my boss used COVID-19 as an excuse to get rid of me. What can I do?

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SPECIAL TO THE GLOBE AND MAIL

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THE QUESTION

I got a new supervisor last year and we have never gotten along. I feel like she has been trying to get me fired for months because I haven't met certain targets. The business has been affected minimally by COVID-19 and I was the only one on my team that was laid off. They claim it was due to the pandemic, but I think they just used it as an excuse to get rid of me. What can I do?

THE FIRST ANSWER

Steven Boorne, Lawyer, HHBG Employment Lawyers, Vancouver: In order for an employer to lay off an employee, an employee must give consent to the layoff, whether in the moment or previously as part of an employment contract. If an employee does not consent, the layoff constitutes a termination.

An employer will often opt for a layoff, as opposed to an outright dismissal, for two key reasons. Employers can defer paying severance for the period of the layoff while at the same time keeping their options open for rehiring.

A layoff can last for only 13 weeks, after which the employee needs to decide whether they want to treat the layoff as a termination or carry on in the hopes of being rehired. Each situation is unique. Sometimes an employer will send a letter of termination at the end of this 13 weeks.

Once a person is terminated, an employer must pay severance, vacation pay and any other outstanding wages within what is usually a 48-hour period.

Employers don't need a reason to fire an employee. So, even if a company bears a grudge against a staff member, unless it's a human-rights violation, the company has the right to fire the employee without explanation.

An employee can inquire about alternative solutions to a layoff. The federal government recently introduced a new Canada emergency wage subsidy, which can provide eligible employers with a 75-per-cent subsidy of an employee's wages for up to 12 weeks.

An employment lawyer can provide advice about options and help strategize an optimal way to approach an employer.

THE SECOND ANSWER

George Cottrelle, Partner, Keel Cottrelle LLP, Toronto: Employment legislation across Canada allows for temporary layoffs for different time periods. Certain provinces have expanded the layoff provisions in light of COVID-19. Layoffs have been widely implemented by employers in Canada in response to the pandemic.

While temporary layoffs are permitted under Canadian legislation, the existing common law jurisprudence provides that unless there is an express or implied provision in the employment relationship, a temporary layoff is a substantive change in the terms of employment, and constitutes constructive dismissal.

There is disagreement amongst employment lawyers whether temporary layoffs because of COVID-19, in businesses permitted to remain open, will be viewed as constructive dismissal by the courts.

Any exceptions by the courts to the current law of constructive dismissal will be based on situations where employers are genuinely and significantly affected by the current economic circumstances. Employers who use COVID-19 as a pretext for reducing their work force, or singling out employees for layoff or terminations for other reasons, should expect to be dealt with harshly by courts.

Your employer's business was minimally affected by the pandemic, and you were the only employee on your team who was laid off, for reasons which you reasonably believe were entirely unrelated to COVID-19. The temporary layoff constitutes constructive dismissal.

You should advise your employer that you do not accept the layoff and are reserving your rights. If your employer recalls you to your same position, then you may either return to work or treat your employment as terminated for constructive dismissal; but in either case, your claim for damages will be limited to your lost wages and benefits during your layoff period. If your employer does not end the

layoff within the maximum period permitted by the applicable legislation, then you should assert your wrongful dismissal claim.

In the interim, you should apply for the Canada Emergency Response Benefit.

Have a question for our experts? Send an e-mail to NineToFive@globeandmail.com

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