



## A termination under statute is a termination for all purposes

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In [Elsegood v. Cambridge Spring Service \(2001\) Ltd.](#), the Ontario Court of Appeal examined whether termination due to length of lay-off under the [Employment Standards Act, 2000](#) (ESA) also qualifies as termination at common law. Once his layoff met the definition of termination under the ESA, Mr. Elsegood successfully filed a claim for common law damages for his termination. The Court of Appeal agreed that termination under the ESA was termination for all purposes, and Mr. Elsegood was entitled to common law damages.

Mr. Elsegood, was a spring technician for Cambridge Spring Service with seven years service. He was 48 years old at the time of termination. On April 4, 2009, due to the economic downturn, he was laid off, with the company continuing to pay their portion of his benefits. Mr. Elsegood was recalled on June 9, 2009, but laid off a second time on July 28, 2009, and remained on layoff from that date forward. On January 22, 2010, the cumulative period of layoff reached the statutory maximum of 35 weeks within a 52-week period, set out in section 56 of the ESA.

Upon reaching this date, Mr. Elsegood elected to proceed against his employer with a claim in small claims court for common law damages for wrongful dismissal. However, the employer argued that Mr. Elsegood's termination was only a termination for the purposes of the ESA, and thus limited Mr. Elsegood's entitlement to damages to those provided under the ESA. Deputy Judge Holub disagreed, and awarded him damages reflecting a notice period of six months, together with interest and costs.

Upon appeal to the Divisional Court, the employer argued that a termination under the ESA should limit recovery to the damages set out in the ESA. The Divisional Court dismissed the appeal in a [short decision](#), stating:

The employer appealed to the Court of Appeal, which refused to set aside the trial judge's award of common law damages based on the employee's termination by the operation of the provisions of the ESA.

The Court's Decision:

The employer's appeal was based on a simple premise: the ESA and the common law are independent regimes; an employee's "actual" employment status is defined by the common law, and the ESA operates only to entitle the employee to the remedies under the ESA. On this premise, common law damages for wrongful dismissal are only available for what would constitute a dismissal at common law and are not available for a "deemed termination" under the ESA.

Mr. Justice Juriensz, for a unanimous Court, dismissed the appeal with two different conclusions: The ESA and common law do not operate as separate regimes, and therefore a termination under the ESA is a termination for all purposes; and, even if termination under the ESA was not termination at law, an employee who was laid off for more than 35 weeks in a 52-week period would be able to claim constructive dismissal at common law.

*A termination under ESA is a termination at common law*

The Court rejected the argument that employment continues notwithstanding termination as defined under the ESA. The employer argued that an employee can be on a prolonged indefinite layoff, but terminated for the purposes of the ESA. However, the Court found that this would have an absurd result, where an employer could avoid the liabilities that flow from the terminating of an employee's employment by placing an employee on layoff for an "indefinite period". It was this result that the statute avoids, by stating that termination occurs once a layoff reaches 35 weeks in a 52-week period. The legislation leaves no room for the continued operation of the common law respecting *when* an employee is terminated.

However, the ESA does allow for the continued application of the common law in respect of the damages which an employee can claim upon termination. An employee who is not otherwise limited by an employment contract is free to choose to proceed by way of the remedies provided under the ESA or at common law. As confirmed by the Supreme Court in [Machtinger](#), the employment standards set out in the ESA are minimum requirements only.

*Constructive dismissal at common law*

At common law, an employer has no right to layoff an employee. Absent a term or condition of employment to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and constitutes constructive dismissal. However, even if an employment agreement allowed for a layoff of more than 35 weeks, it would be void as being inconsistent with the ESA. As confirmed by [Machtinger](#), employers and employees can agree to provide greater benefits than those set out in the ESA, but they cannot contract out of the ESA minimum entitlements. The argument put forward by the employer in this case purported to do exactly that by extending a layoff for an indefinite time period. Therefore, even if the argument was accepted that employment status continues at common law after a statutory termination under the ESA, the employee could claim constructive dismissal whenever a layoff exceeds 35 weeks in a 52-week period.

In the result, the appeal was dismissed, and Mr. Elsegood was awarded costs of the appeal in addition to the common law termination entitlements awarded by the trial judge.

**Our Views:**

This case is interesting in that it states that employers cannot place an employee on a layoff which exceeds 35 weeks in a 52-week period, under any circumstances. This decision will be of interest to employers who have, or who are considering laying off employees in the current economic climate.

It is important to note that collective agreements may have layoff provisions which supersede the provisions of the ESA, certainly as it relates to recall rights (i.e. some nexus of continuing employment), and therefore the discussion above is mostly applicable to non-unionized employees. Employers who are considering laying off unionized employees should carefully consider the applicable collective agreement, and consult legal counsel before proceeding.

If you have any questions regarding the obligations owing in regards to the layoff or termination of a specific employee, you should consult with legal counsel.

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