

**PROVINCIAL EMPLOYMENT STANDARDS LAWS DO NOT SUPERSEDE EMPLOYEE'S
COMMON LAW RIGHT TO VIEW LAYOFF AS DISMISSAL**

Turner v. Uniglobe Custom Travel Ltd., [2005] A.J. No. 945.

An Alberta judge recently ruled that an employee's common law right to claim constructive dismissal may trump the provisions of provincial employment standards legislation which purport to limit an employee's entitlement to termination and severance pay in layoff situations.

Employed for 15½ years in a senior capacity at Uniglobe Custom Travel Inc. in Calgary, Heather Turner was laid off on October 1, 2001 as a cost-cutting measure in response to reduced travel business. The layoff letter advised her that, "[s]hould client volumes recover to the extent that we can recall you, we will do so within 60 days."

Turner treated the layoff notice as a dismissal and replied with a letter demanding severance pay from the employer. This letter was followed by a letter from Turner's lawyer, which formally repeated the demand for severance pay. Both letters were ignored by the employer. However, on October 30, the Uniglobe president sent a letter directly to Turner purporting to recall her from layoff within the 60 day window and advising her that she was to resume work on Monday, November 5. Turner ignored this letter, and sued for wrongful dismissal.

At trial, Uniglobe argued that Turner had not been dismissed, but had resigned her job by failing to return to work when she was recalled from layoff. In support of this position, the employer relied on several provisions of Alberta's *Employment Standards Code* (the "Code") which specifically provide that an employee will not be "terminated" where he/she is on layoff and is recalled within a period of up to 60 days. Turner responded that these provisions did not deprive her of her common law right to treat her layoff as a constructive dismissal, because of the provision in s. 3(1) of the *Code* that "[n]othing in this Act affects (a) any civil remedy of an employee or an employer; (b) an agreement, a right at common law or a custom that (i) provides to an employee earnings, maternity and parental leave or other benefits that are at least equal to those under this Act, or (ii) imposes on a employer an obligation or duty greater than that under this Act."

The Alberta Court of Queen's Bench upheld Turner's claim and ruled that she had been wrongfully dismissed, holding that "Turner's common law right to treat her layoff as a termination is preserved, and she should be entitled to compensation for wrongful dismissal." The judge noted that several decisions in Ontario and British Columbia ruled that the common law prevailed despite legislation similar to Alberta's. Additionally, the judge held that his view was bolstered by the Supreme Court of Canada's ruling in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. In that case, the Supreme Court held that "since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be interpreted in favour of the claimant."

Accordingly, the Court concluded that Turner's common law right to treat her layoff as a dismissal took precedence over the provisions of the *Code* and ruled that she had been wrongfully dismissed. Turner was awarded damages of 11 months' pay in lieu of notice.

The decision in *Turner* illustrates that while layoffs are a normal feature of unionized workplaces, a layoff in a non-unionized workplace will generally be considered by the courts to be a constructive dismissal unless the employee has expressly agreed to the possibility of layoffs as a condition of employment. Non-union employers should therefore consider the potential liability they face at common law when implementing layoffs. In all likelihood, the layoff provisions of the provincial employment standards legislation (in Ontario, the *Employment Standards Act, 2000*) will not shield employers from liability for constructive dismissal at common law.