



What's New in HR Law

Deemed IDEL: Does it Amount to Constructive Dismissal or Not?

June 10, 2021

The Bottom Line

Under the *Infectious Disease Emergency Leave Regulation* (“Regulation”) that was enacted under the *Employment Standards Act, 2000* (“ESA”) in the early stages of the pandemic, employees that experience a temporary reduction in hours of work or wages for reasons relating to COVID-19 are deemed to be on a job-protected Infectious Disease Emergency Leave (“IDEL”).

The Regulation makes clear that an employee who is deemed to be on IDEL will not be considered to have been constructively dismissed for purposes of the *ESA*. However, even after the enactment of the Regulation, the question remained whether a temporary reduction in hours of work or wages caused by the pandemic could amount to a constructive dismissal at common law.

In two recent decisions, the Ontario Superior Court was called upon to wrestle with this very question, resulting in the release of two diametrically opposed perspectives on the impact of the Regulation. Amidst the release of these decisions, the Ontario Government also announced the extension of the COVID-19 Period defined under the Regulation, such that the deemed IDEL protections will extend from March 1, 2020 through to September 25, 2021.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

This update reviews these recent developments and the implications for employers.

Coutinho v Ocular Health Centre Ltd, 2021 ONSC 3076 (“Coutinho”)

In [Coutinho](#), the plaintiff commenced an action for constructive dismissal after being placed on a temporary layoff due to the shutdown of the defendant’s business during the COVID-19 period. The defendant brought a motion to dismiss the plaintiff’s claim on the basis that, among other reasons, she had no cause of action for constructive dismissal as a result of the Regulation. The plaintiff asserted the Regulation had no impact on the common law right to pursue a civil claim.

The Court dismissed the defendant’s motion, siding with the plaintiff. Relying on section 8 of the *ESA*, the Court held the *ESA* did not affect an employee’s right to seek a civil remedy against their employer. Noting that the Regulation must be interpreted having regard to its enabling statute, the Court concluded that the Regulation did not preclude an employee from pursuing a claim for constructive dismissal at common law. In support of this interpretation of the *ESA*, the Court considered an online publication of the Ontario Ministry of Labour, Training and Skills Development which stated that the Regulation only affected what constitutes a constructive dismissal under the *ESA*, and not constructive dismissal at common law.

Taylor v Hanley Hospitality Inc., 2021 ONSC 3135 (“Taylor”)

In [Taylor](#), the same question was at issue, but a different result was achieved. In this case, the plaintiff was a food service worker who was temporarily laid off due to the government-mandated closure of dine-in operations at the defendant’s restaurant. The plaintiff was one of over 50 employees impacted. The plaintiff commenced an action against the defendant, alleging the temporary layoff constituted a constructive dismissal. As in *Coutinho*, the plaintiff alleged the Regulation did not displace the common law doctrine that a temporary layoff, without any contractual authority, constituted a constructive dismissal.

However, in *Taylor*, the Court ruled in favour of the defendant employer, finding the Regulation displaced the plaintiff’s common law right to commence a claim for constructive dismissal. Based on the provisions of the Regulation, the Court held that all temporary layoffs relating to COVID-19 were deemed to be an IDEL and all normal rights for statutory leaves were applicable, including reinstatement rights and continuation of benefits during leave.

Having the opportunity to review the decision prior to rendering its own, the Court stated that the decision in *Coutinho* was incorrect at law for a number of reasons. Notably, the Court held that the interpretation of the Regulation set out in *Coutinho* rendered it meaningless. The Court helpfully made the following observation:

The employee cannot be on a leave of absence for ESA purposes and yet terminated by constructive dismissal for common law purposes. That is an absurd result.

In support of the above conclusion, the Court noted the obvious purpose of the Regulation was to fix the “problem” the government created by mandating the defendant (and other employers) to shutter their operations. As a direct result of the government’s unilaterally imposed public health measures, employers were exposed to significant liability for claims of

constructive dismissal. The Court held the Regulation was enacted to solve this very problem and protect employers from the exposure to liability over which they had no control.

Further, the Court held that section 8 of the *ESA* is merely intended to convey that there is not only one forum in which employees can seek to deal with matters addressed by the Act. Employees can make a complaint under the *ESA* or, alternatively, can seek redress before the courts.

Taking judicial notice of the exceptional circumstances brought on by the COVID-19 pandemic – a global health crisis – the Court held that the *ESA* and the Regulation can, and does, displace the common law with respect to constructive dismissal by deeming employees who would otherwise be temporarily laid off as being on an IDEL.

Based on the foregoing, the Court in *Taylor* held that the plaintiff was not constructively dismissed and dismissed the action.

Recent Amendments to the Regulation

In addition to the recent jurisprudence outlined above, the Regulation has recently been [amended](#) to extend the end date of the prescribed COVID-19 period to September 25, 2021. The protections afforded by the Regulation were previously scheduled to expire on July 3, 2021.

This amendment provides employers with additional protection while the province (and Canada as a whole) shows signs of slowly easing lockdown restrictions and, hopefully, approaching the end of the COVID-19 pandemic.

It remains to be seen if the Ontario government will further amend the Regulation or the *ESA* to provide additional clarity in resolving the conflicting results in the *Coutinho* and *Taylor* cases.

Check the Box

Given that the decisions in *Coutinho* and *Taylor* are diametrically opposed, employers are still faced with uncertainty around just how far the protections of the Regulation will extend to safeguard against claims of constructive dismissal.

While the *Taylor* decision is certainly a welcome development for employers, and makes a strong case for its interpretation of the Regulation, time will tell whether this same logic and sound reasoning will be applied in subsequent cases. We are continuing to monitor developments on this issue closely and will update our readers as they occur.

In the meantime, employers should keep the following in mind:

1. The protections afforded by the Regulation have been extended until September 25, 2021. However, reductions in an employee's wages or hours of work will only be deemed to be an IDEL where the changes are both temporary, and introduced for reasons related to COVID-19. Furthermore, and as outlined above, even where both of these criteria are met, there is still the risk that employers may face liability for constructive dismissal at common law.

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2. Employers who may still have staff out on layoff should carefully monitor their operations and consider issuing recall notices as soon as reasonably possible in order to minimize risk and exposure to liability relating to claims of constructive dismissal.
3. The most effective way to minimize the risks associated with temporary layoffs is to build a contractual right to implement layoffs expressly into the employment agreement. Careful drafting is required to achieve this result, and additional considerations will apply where this is being introduced as a new term of employment for existing employees. Employers considering this approach should first speak with counsel.

Need more information?

For more information about workplace management amidst the ongoing COVID-19 pandemic, or for representation in the context of constructive dismissal litigation please contact [Clifton Yiu](#) at 416.408.5501 or your regular lawyer at the firm.



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