



# What's New in HR Law

## Ontario Court of Appeal Declines to Clarify Whether Infectious Disease Emergency Leave Ousts Common Law Constructive Dismissal

May 12, 2022 | By [Laura J. Freitag](#)

### The Bottom Line

The [Infectious Disease Emergency Leave Regulation, O. Reg. 228/20](#) (“Regulation”) enacted under the *Employment Standards Act, 2000* (“ESA”) in the early stages of the pandemic provided that employees who experienced a temporary reduction in hours of work or wages for reasons relating to COVID-19 were deemed to be on a job-protected Infectious Disease Emergency Leave (“IDEL”).

Under this Regulation and section 50.1 of the *ESA*, 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, it was unclear whether a temporary reduction in hours of work or wages caused by the pandemic could amount to a constructive dismissal at common law.

The question of whether deemed IDEL amounted to a constructive dismissal at common law has been the subject of two key decisions by the Ontario Superior Court (see our update by [Clifton Yiu here](#) for a summary of these decisions). In [Coutinho v Ocular Health Centre Ltd., 2021 ONSC 3076](#), the motion judge found that the Regulation had no impact on the common law right to pursue a civil claim. This

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decision was not appealed. In contrast, in [Taylor v Hanley Hospitality Inc., 2021 ONSC 3135](#), the motion judge reached the opposite conclusion, finding that the Regulation displaced any common law constructive dismissal claim.

On May 12, 2022, the Court of Appeal released its appeal decision in [Taylor v Hanley Hospitality Inc., 2022 ONCA 376](#). In this decision, the Court of Appeal declined to clarify whether deemed IDEL amounted to a constructive dismissal at common law. The Court specifically noted that the record before it on appeal was inadequate to determine this issue, and that the matter should be remitted to the Superior Court of Justice for a determination based on a proper record, which may also include submissions from the Attorney General of Ontario with respect to the legislative intent and context of the Regulation.

The Court of Appeal's decision in *Taylor v Hanley Hospitality Inc.* leaves employers still facing uncertainty about whether the Regulation protects them from claims of constructive dismissal as a result of employees being placed on deemed IDEL.

## The Superior Court Decision

*Taylor v Hanley Hospitality Inc.* was a decision on a Rule 21 motion brought under the Ontario *Rules of Civil Procedure* by the defendant employer. Rule 21 motions permit a court to determine an issue before trial, but do so based on only a limited record since no evidence is admissible on such motions without leave of the court or on consent of the parties. In this case, the defendant employer brought a motion requesting that a motion judge of the Superior Court determine whether the plaintiff employee's constructive dismissal claim was precluded as a result of the Regulation and section 50.1 of the *ESA*.

The motion judge 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 motion judge 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.

In reaching the decision, the motion judge took judicial notice of a number of facts, including the exceptional circumstances brought about by the COVID-19 pandemic and that the defendant employer was required by the government to close all storefronts. The motion judge dismissed the plaintiff's action, finding that there was no constructive dismissal and specifically finding that section 50.1 and the Regulation displaced the common law with respect to constructive dismissal by deeming employees who would otherwise be temporarily laid off as being on an IDEL.

## The Appeal Decision

The Court of Appeal for Ontario overturned the motion judge's decision as a result of procedural errors, remitting it back to the lower court to determine on a proper record the issue of whether deemed IDEL displaced the common law.

The Court specifically found that the motion judge erred in failing to apply the correct principles under Rule 21.01(1)(a) and erred in treating the allegations in the defendant's statement of defence as admitted facts. The Court also took issue with the judicial notice of facts taken by the motion judge to reach their decision. In reviewing the errors in the motion judge's decision, the Court found that the motion judge focused their analysis too narrowly on only some of the provisions of the Regulation and

the *ESA*, and did not interpret them in the larger context that was required in the circumstances of this case.

While the Court of Appeal decision does not clarify the constructive dismissal issue or resolve the conflicting case law, it does provide some direction to lower courts on the type of analysis that should be performed when reviewing these claims and provides further direction on the use of motions under Rule 21, specifically:

1. In constructive dismissal cases, statutory interpretation issues are intertwined with the factual issues in the case and parties will be expected to proceed with these claims on an adequate factual record.
2. Courts reviewing these claims will be expected to make factual findings as to whether a common law constructive dismissal occurred, in fact, before considering whether the Regulation and the *ESA* displace any such common law claims.
3. Parties litigating these issues should consider inviting the Attorney General of Ontario to provide submissions to assist with resolving any issues of statutory interpretation.
4. Parties should think strategically about proceeding with Rule 21 motions where the issues on the motion necessitate a comprehensive factual record or raise factual questions. Notably, this is consistent with the recent Divisional Court decision in [\*Donaghy v Seasons Retirement Communities, 2021 ONSC 6197\*](#). In this case, the Divisional Court found that an issue of contractual interpretation of a termination provision in an employment agreement (a question of mixed fact and law) was not amenable to a Rule 21 motion, given that such provisions must be considered in light of the factual matrix.

## Check the Box

Given that the motion judge's decision in *Taylor v Hanley Hospitality Inc.* has been overturned and the opposite decision was reached in *Coutinho v Ocular Health Centre Ltd.* (which was not appealed), employers face additional risks in defending constructive dismissal claims as a result of this decision. There may be further decisions released by courts considering this issue afresh in the coming months in light of the directions from the Court of Appeal. 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 currently been extended until July 30, 2022. However, reductions in an employee's wages or hours of work will be deemed to be an IDEL only where the changes are both temporary and introduced for reasons related to COVID-19. As underscored by this decision, there is still a risk that employers may face liability for constructive dismissal at common law even where both of these criteria are met.
2. Employers who still have staff out on layoff should carefully monitor their operations and consider issuing recall notices to minimize risk and exposure to liability relating to constructive dismissal claims.

3. One strategy to minimize the risks associated with temporary layoffs is to build a contractual right to implement layoffs expressly into the employment agreement. Employers considering this approach should first speak with counsel.

### Need More Information?

For more information or assistance with managing IDEL or the risks around constructive dismissal claims in light of this recent decision, contact [Laura J. Freitag](#) at 416-408-5505 or your regular lawyer at the firm.



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