

Member's Quarterly

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Feature

Infectious Disease Emergency Leave (IDEL) and Constructive Dismissal

What can the employer do?



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In March 2020, the Ontario government enacted the IDEL Regulation under the Ontario *Employment Standards Act, 2000* ("ESA"). This Regulation deems employees whose hours/wages have been reduced or eliminated due to COVID-19 to be on Infectious Disease Emergency Leave. The Regulation explicitly states that a reduction of hours/wages due to COVID-19 does not constitute a constructive dismissal under the ESA.

The question remains, however, if placing an employee on IDEL could constitute constructive dismissal at common law, and therefore triggering an obligation to provide a termination package. In pre-COVID times, a temporary layoff was generally found to be a constructive dismissal at common law, unless the employer had an express or implied right to implement such layoffs.

The Ontario Superior Court of Justice recently addressed this issue in *Coutinho v. Ocular Health Centre Ltd., 2021 ONSC 3076*. The Court held that placing an employee on a temporary layoff/IDEL for reasons related to COVID-19 can constitute a constructive dismissal at common law. In other words, an employee placed on temporary layoff/IDEL may be able to sue for constructive dismissal under common law and claim a termination package.

In reaching this decision, the Court relied on section 8 of the ESA which provides that no civil remedy is affected by the ESA. The court also took into consideration the Ministry of Labour's publication *Your Guide to the Employment Standards Act: temporary changes to ESA rules*. While the Guide confirmed that a temporary layoff related to COVID-19 would not constitute a constructive dismissal, it went on to state "These rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law."

Given this recent development, we do anticipate an influx in constructive dismissal claims from employees that have been placed on IDEL/temporary layoff due to COVID-19. However, there may be several defences available to employers, including:

- 1. Contractual Right to Layoff:** If an employer has an express right to lay off its employees in an employment contract or policy, it would be a strong defence to a constructive dismissal claim. We recommend that such clauses be included in all employment contracts and/or policies going forward.
- 2. Implied Right to Layoff:** Where an employer has a past practice of laying off employees (i.e. in certain industries), it can argue that it has an implied right to such layoffs as a defence to a constructive dismissal claim. A further defence which has not yet been tested is that the unprecedented circumstances surrounding the pandemic have created an implied right to lay off an employee due to COVID-19.
- 3. Condonation:** Where an employee is faced with a material change to their employment and they do not object to that change within a reasonable period, they are deemed to have condoned the change and cannot later claim constructive dismissal. Accordingly, if an employee was placed on IDEL at the beginning of the pandemic and only raises constructive dismissal once they are recalled months later, the employer may be able to raise condonation as a defence.
- 4. Frustration:** Where an employment contract has become impossible to perform through no fault of either party, the employment relationship may be deemed to be frustrated. If an employer was forced to close by government order and had to lay off its employees as a result, it may be able to claim a

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frustration of the employment contact, rather than a constructive dismissal of employment. In the case of frustration, no common law termination package would be owing.

As the laws surrounding the pandemic continue to develop, we will keep an eye out on the success of the above defences and any novel defences raised to a constructive dismissal claim. There will likely be several legal developments on this topic in the coming months and years.

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