

Good News for Employers: IDEL COVID-19 Period Extended and Court Finds Placing Employee on IDEL was not a Constructive Dismissal

Ontario employers will welcome two recent developments pertaining to an employer's ability to manage its workforce during the COVID-19 pandemic.

First, the Ontario Government has extended the application of O.Reg 228/20, *Infectious Disease Emergency Leave* ("IDEL Regulation" or "Regulation") until September 25, 2021. The IDEL Regulation provides relief measures to prevent mass terminations during COVID-19 and protects employers from statutory termination claims resulting from COVID-19-related layoffs.

Second, in *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135 ("*Taylor*"), the Ontario Superior Court held that the IDEL Regulation precludes common law claims for constructive dismissal where an employee's hours are temporarily reduced or eliminated for reasons related to COVID-19. *Taylor* comes on the heels of another ONSC decision that reached the opposite conclusion. We expect the Ontario Court of Appeal to weigh in on this issue soon.

Relief From the ESA's Constructive Dismissal and Temporary Layoff Rules Extended

On May 20, 2020, the IDEL Regulation came into effect under the *Employment Standards Act, 2000* ("*ESA*"). The IDEL Regulation provides temporary relief from various provisions of the *ESA* for non-unionized employers whose operations have been impacted by COVID-19. In particular, the IDEL Regulation provides:

- An employee whose hours of work have been temporarily reduced or eliminated during the COVID-19 period for reasons related to COVID-19 is deemed to be on an unpaid "infectious disease emergency leave" ("IDEL"), not on temporary layoff; and
- A temporary reduction or elimination of an employee's hours or wages during the COVID-19 period for reasons related to COVID-19 is not a constructive dismissal under the *ESA*.

The COVID-19 period was set to expire on July 3, 2021. However, the Ontario Government has amended the Regulation to extend the COVID-19 period until September 25, 2021.

When the Regulation came into effect, it was clear that an employee placed on IDEL would not be considered laid off or terminated under the *ESA*. However, the question remained what impact it would have on common law claims for constructive dismissal. Previous case law found that temporary layoffs were permissible under the *ESA* but constituted a constructive dismissal at common law unless the employee's contract expressly or impliedly permitted them.

ONSC Finds IDEL Regulation Protects Employers from Common Law Constructive Dismissal Claims

It appeared that we had some clarity on how courts would decide this issue on April 27, 2021, when Justice Broad of the Ontario Superior Court of Justice held that placing an employee on IDEL was a constructive dismissal at common law (see: *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 (“*Coutinho*”)).

However, in a decision released on June 7, 2021, Justice Ferguson, a judge of the same court, reached the opposite conclusion. In *Taylor v. Hanley Hospitality Inc.*, Justice Ferguson held that the IDEL Regulation protects employers from common law claims for constructive dismissal where an employee is placed on IDEL.

Background

On March 27, 2020, Ms. Taylor was temporarily laid off from her employment with Tim Hortons for reasons related to COVID-19.

Ms. Taylor sued Hanley Hospitality o/a Tim Hortons, claiming that her temporary layoff was a constructive dismissal and that her employment had been terminated. Ms. Taylor argued that the IDEL Regulation does not displace the common law and, thus, was not a bar to her common law claim for constructive dismissal.

Tim Hortons brought a motion requesting a determination that Ms. Taylor’s layoff during the COVID-19 period was not a constructive dismissal at common law.

Decision

Justice Ferguson held that the IDEL Regulation bars a common law claim for constructive dismissal where an employee is placed on IDEL.

Justice Ferguson held that temporary layoffs relating to COVID-19 during the COVID-19 period are deemed to be IDELs pursuant to the IDEL Regulation. Therefore, employees who are placed on IDEL are not on layoff and any argument regarding the common law on layoffs is inapplicable and irrelevant.

Justice Ferguson rejected the argument that the *ESA* cannot displace common law, which was the basis of the Court’s decision in *Coutinho*. Finding otherwise would lead to an absurd result whereby an employee could be on a permissible leave of absence for *ESA* purposes but constructively dismissed for common law purposes. Instead, she held that the IDEL Regulation can and did change the common law.

In reaching her decision, Justice Ferguson gave significant weight to the context of the IDEL Regulation. When the COVID-19 pandemic hit, the Ontario Government forced employers to lay off employees by ordering businesses closed. In doing so, it exposed employers to claims of

common law constructive dismissal. According to Justice Ferguson, the legislature clearly created the IDEL Regulation to shield employers from all constructive dismissal claims resulting from COVID-19-related temporary layoffs:

“I agree with Tim Hortons that exceptional situations call for exceptional measures. The Ontario Government recognized the inherent unfairness in subjecting employers to wrongful dismissal claims as a result of the government imposing a state of emergency. If they did not take action, these claims would only serve to make the economic crisis from the pandemic even worse. It is just common sense. The plaintiff’s action is dismissed.”

Practical Takeaways

This is a helpful decision for employers. However, Ontario is now left with two conflicting decisions and little guidance on how courts will decide the issue of whether placing an employee on IDEL is a constructive dismissal at common law. Given the significant implications for employers and employees, it is likely that the Ontario Court of Appeal will weigh in to provide some clarity.

We will keep our readers apprised of any updates in the law regarding this issue.

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