

Unliterally Placing an Employee on an Infectious Disease Emergency Leave can be a Constructive Dismissal at Common Law

An Ontario Court has now confirmed that unilaterally placing an employee on an Infectious Disease Emergency Leave (“IDEL”) can amount to a constructive dismissal at common law. This finding is made in spite of Ontario Regulation 288/01 (“O. Reg. 288/01”) under the Employment Standards Act, 2000 (the “ESA”), which provides that temporarily reducing or eliminating an employee’s hours of work for reasons related to COVID-19 does not amount to a constructive dismissal under the ESA.

The analysis of the decision in *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 307, is analogous with how temporary layoffs have been treated in Ontario for non-unionized employees: they are permissible under the ESA but can constitute a constructive dismissal at common law.

Background:

Ms. Coutinho was employed by Ocular Health Centre as an ophthalmic physician. On May 29, 2020, Ms. Coutinho was placed on a temporary lay-off. On June 1, 2020, Ms. Coutinho commenced an action against Ocular for constructive dismissal. In its Statement of Defence, Ocular relied upon O. Reg. 288/01 in pleading that Ms. Coutinho was on a deemed IDEL and therefore, the temporary elimination of her employment duties and hours did not constitute a constructive dismissal. On July 22, 2020, Ms. Coutinho obtained new employment with greater remuneration compared to what she had earned with Ocular.

Ocular brought a motion for summary judgment to have the action dismissed on the basis that in accordance with O. Reg. 288/01, Ms. Coutinho was not constructively dismissed.

Decision:

Justice Broad denied Ocular’s motion and held that the O. Reg. 288/01 does not bar a claim for constructive dismissal.

Justice Broad found that the scope of O. Reg. 288/01 is limited by its enabling statute, the ESA. Section 8(1) of the ESA, which provides that: “*Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act*”. Pursuant to section 8(1), Ms. Coutinho’s ability to bring a civil claim for constructive dismissal on the basis of a COVID-19 related layoff was not barred by O. Reg. 288/01. Justice Broad held that it was not possible to reconcile section 8(1) of the ESA with the legal position being taken by Ocular.

In addition, Justice Broad relied on a Ministry of Labour publication regarding O. Reg. 288/01 which explicitly stated: “*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*”.

Practical Take-Aways:

O. Reg 288/01 cannot be used as a full defence to a claim for constructive dismissal at common law. Having said that, not all employees who have been placed on an IDEL necessarily have a claim for constructive dismissal. The same principles governing temporary lay-offs will apply with key considerations being the following:

- a. Did the employee reject a material change to the terms and conditions of their employment?
- b. Does the employer have the express or implied contractual right to temporarily reduce the employee's hours and/or pay? In deciding this question, both a written contract of employment as well as any evidence of past practice will be highly relevant.

The analysis on each these questions is entirely fact dependant and legal advice should be obtained to assess whether or not an employee has a claim for constructive dismissal.

For further information, please contact a member of our growing team: Leslie Dizgun, Allyson Fischer, Mitchell Smith, Paul Schwartzman, Justin Anisman, William McLennan, Alyssa Jagt, and Oscar Moody.

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