

Effects of IDEL on the Common Law Doctrine of Constructive Dismissal Uncertain

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Employers were forced to navigate through unprecedented times with the onset and subsequent global hold of the COVID-19 pandemic. In response, many employers were forced to significantly reduce their workforce, often by way of temporary layoffs. However, with the increase in temporary layoffs brought uncertainty as to whether such an action was constructive dismissal at common law.

In response to the COVID-19 pandemic, the Government of Ontario declared a state of emergency and subsequently amended the *Employment Standards Act, 2000* (the ESA) and created O. Reg. 228/20: *Infectious Disease Emergency Leave* (the Regulation). The effect of these changes resulted in a new leave: the infectious disease emergency leave (IDEL).

Among other things, the Regulation stated that an employee whose hours of work or wages had been temporarily reduced due to COVID-19 could be deemed to be on IDEL. The Regulation further provided that employees who were deemed to be on IDEL under these circumstances were not considered to be constructively dismissed and that such employees were prohibited from bringing any complaint during the designated pandemic period. While these legislative changes were initially welcomed by employers, it quickly became apparent that the effects of the amended ESA and the Regulation on the common law doctrine of constructive dismissal were uncertain.

To date, this issue has been addressed in three decisions. First, the Ontario Superior Court in *Coutinho v Ocular Health Centre Ltd.*¹ determined that a layoff related to COVID-19 could be constructive dismissal at common law and that the employee's common law claim for constructive dismissal was not displaced by the Regulation. Next, the Ontario Superior Court in *Taylor v Hanley Hospitality Inc. (Taylor)*² held that the amendment to the ESA and creation of the Regulation *did* displace the common law doctrine of constructive dismissal in the context of COVID-19 and dismissed the appellant's action for constructive dismissal. Finally, *Taylor* was appealed to the Ontario Court of Appeal and a decision was rendered on May 12, 2022, setting aside the Superior Court's decision.³

Background

In *Taylor*, the appellant was an Assistant Manager at a fast-food franchise. She was placed on temporary layoff without pay on March 27, 2020, and was recalled to employment in September 2020. Prior to her

being recalled, the appellant filed a claim alleging that the temporary layoff constituted constructive dismissal.

On appeal, the Court of Appeal set aside the motion judge's order and declined to consider the impact of the ESA and the Regulation on the common law doctrine of constructive dismissal. The Court of Appeal held that the motion judge erred by treating the respondent's rule 21.01(1)(a) motion as if it were a motion for summary judgment and deeming the allegations outlined in the statement of defence to be admitted facts by virtue of the appellant not filing a reply. Given these errors, the motion judge's analysis of the amendments was tainted and therefore could not be accepted.

In the end, the Court of Appeal did not weigh in on the substance of the claims made by the appellant against her former employer. Instead, the case was sent back to the Superior Court to be readjudicated.

Key Takeaways

While many employers were hoping for guidance and clarity from *Taylor* on the impact of the ESA amendments and the Regulation, it remains unclear. Of the three decisions, there are now two that support the assertion that IDEL does not displace the common law doctrine of constructive dismissal. However, there is no final word on the matter.

Employers should take the time to review their employment agreements and ensure that all have a valid and enforceable termination provision as well as a layoff provision. The IDEL provisions will remain in force until July 31, 2022. As such, any employer considering placing an employee on IDEL or continuing IDEL should consult with a member of our Employment and Labour Group.

¹ 2021 ONSC 3076.

² 2021 ONSC 3135.

³ 2022 ONCA 376.