

Goodmans^{LLP} Update

IDEL May Not Preclude Employees from Claiming Constructive Dismissal

The Ontario Superior Court recently ruled that an employee who was “placed on temporary layoff” due to the COVID-19 pandemic and deemed on infectious disease emergency leave, was constructively dismissed at common law.

In *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076, the Court considered whether an employee placed on temporary layoff under [Ontario Regulation 228/20: Infectious Disease Emergency Leave](#) (“IDEL”), was constructively dismissed and, as a result, entitled to severance pay and other damages in connection with her dismissal. The plaintiff employee, Ms. Coutinho, argued that, regardless of the reason for her layoff, IDEL does not affect her common law right to sue her employer in court for constructive dismissal. The employer argued that it had temporarily laid off the plaintiff employee due to the impact of COVID-19 and, as the employee was deemed to be on temporary leave pursuant to IDEL, the temporary reduction or elimination of the employee’s hours of work did not constitute constructive dismissal; as long as the employee was recalled to work within the period prescribed by IDEL, the employer argued no severance pay or other damages were owing.

IDEL was enacted under the *Employment Standards Act, 2000* (“ESA”) on May 29, 2020, in response to the widespread workplace closures necessitated by the COVID-19 pandemic. Under the regulation, an employee is deemed to be on “infectious disease emergency leave” where:

1. the employee is not represented by a trade union;
2. the employer temporarily reduces or eliminates the employee's hours of work and/or wages for reasons related to COVID-19; and
3. the temporary reduction or elimination occurs during the “COVID-19 period” as defined by the regulation.

IDEL specifically states that a reduction or elimination in a non-unionized employee’s hours and wages for reasons related to COVID-19 (1) does not constitute a layoff within the meaning of the ESA and (2) does not constitute constructive dismissal.

The Court found Ms. Coutinho had been constructively dismissed at common law and was therefore entitled to damages for wrongful dismissal. In making its determination, the Court relied on section 8(1) of the ESA, which provides the ESA does not affect an employee's rights to pursue a civil remedy against an employer. The Court reasoned that this was reinforced by guidance published by the Ministry of Labour, Training and Skills Development, which explicitly states that IDEL affects only what constitutes a constructive dismissal under the ESA and does not address what constitutes a constructive dismissal at common law.

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While it is not yet known whether the Court's decision will be appealed, employers should be mindful that irrespective of IDEL, a unilateral change that substantially alters an employment contract, such as a temporary layoff, may constitute constructive dismissal at common law. Employers should review applicable employment agreements before making any temporary changes to employee work hours or compensation in response to COVID-19, and may wish to seek legal advice. Further, employers drafting new employment agreements may wish to consider including explicit language permitting temporary reductions in hours or wages in circumstances such as the COVID-19 pandemic.

For further information, please contact any member of our [Employment and Labour Group](#).

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