

## **Court Finds COVID-19 Related Temporary Layoff Constitutes a Constructive Dismissal**

May 2021

A recent decision of the Ontario Superior Court, *Coutinho v. Ocular Health Centre*<sup>1</sup>, could open the floodgates to constructive dismissal claims against employers from employees temporarily laid off as a result of the COVID-19 pandemic.

In the early days of the pandemic, many employers were forced to temporarily lay off employees. In response, on May 29, 2020 the Government of Ontario introduced a regulation under the *Employment Standards Act, 2000* (“ESA”) that deemed an employee laid off for a COVID-19 related reason to be on infectious disease emergency leave (the “[IDEL Regulation](#)”).

The IDEL Regulation specifically states a reduction of hours or wages for a COVID-19 related reason after March 1, 2020 until July 3, 2021 (unless further extended by the Government) is not a constructive dismissal:

7. (1) The following does not constitute constructive dismissal if it occurred during the COVID-19 period:

1. A temporary reduction or elimination of an employee’s hours of work by the employer for reasons related to the designated infectious disease.
2. A temporary reduction in an employee’s wages by the employer for reasons related to the designated infectious disease.

...

Despite the IDEL Regulation, the question remained: Could an employee still claim that a layoff or substantial reduction in hours related to COVID-19 constituted a constructive dismissal at common law? According to the recent court decision, the answer is, ‘yes’.

### **What happened?**

Jessica Coutinho (“Coutinho”) was employed with Ocular Health Centre Ltd. (“Ocular”) as an office manager at one of its two clinics in Ontario. A dispute arose between the principles of Ocular and the doctors practicing out of its Cambridge, Ontario clinic where Coutinho worked. The dispute related, in part, to an allegation the doctors were not adhering to proper COVID-19 protocols. On May 1, 2020,

---

<sup>1</sup> 2021 ONSC 3076

Ocular closed its Cambridge office. Initially, Ocular continued to pay Coutinho but, on May 29, 2020, informed her she would be placed on temporary layoff and recalled as soon as possible.

Two days later, on June 1, 2020, Coutinho commenced a law suit against Ocular, alleging the temporary layoff constituted a constructive dismissal under the common law, and claiming \$200,000 in damages. The following month, Coutinho commenced new employment with the former doctors of the Cambridge clinic.

The claim proceeded by way of summary judgment motion and the court considered two issues: (1) did the IDEL Regulation preclude a claim for constructive dismissal at common law; and (2) if not, did the temporary layoff amount to a common law constructive dismissal?

### **The IDEL Regulation and the Common Law**

Ocular argued that, given the unprecedented emergency brought on by COVID-19, the IDEL Regulation ought to apply to preclude both statutory and common law constructive dismissal claims. That is, a layoff related to COVID-19 should not constitute a constructive dismissal under either the ESA or common law.

This seemed like a reasonable and appropriate approach. The rapid onset of the pandemic caused many businesses to dramatically scale down, or close operations, with little notice. It therefore seemed fair to both employers and employees that a resulting reduction in an employee's wages/hours, or layoff, should not automatically trigger a termination.

The motions judge rejected this argument, concluding that while the IDEL Regulation precluded an ESA claim of constructive dismissal, it did not affect Coutinho's right to pursue a common law claim for constructive dismissal. Relying on 8 of the ESA, which states, "*Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act*" the judge held:

In my view, the scope of s. 7 deeming a temporary lay-off for reasons related to COVID-19 to not constitute a constructive dismissal is constrained by s. 8(1) of the ESA. It is not possible to reconcile the interpretation of the IDEL Regulation urged by Ocular with the section of the statute which unequivocally provides that an employee's civil remedy against her/his employer shall not be affected by any provision of the Act.

The judge also referred to a publication prepared by the Ontario Ministry of Labour, Training and Skills Development which stated, "(t)hese rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law".

### **Was Coutinho's Layoff a Constructive Dismissal?**

Ocular argued the layoff did not amount to a constructive dismissal because Coutinho had not inquired whether she might be called back to work before commencing the law suit. In other words, Coutinho had "jumped the gun" in taking the position she had been dismissed.

The motions judge rejected this argument, ruling Coutinho was entitled to treat the unilateral layoff as bringing the employment relationship to an end; and further, that Coutinho did not have any obligation to first inquire whether Ocular might call her back to work.

As for damages, Coutinho had fully mitigated her losses as of July 22, 2020 – less than two months after having been placed on layoff. The actual dollar value of the claim was therefore quite limited. Nevertheless, the court ruled Coutinho was entitled to statutory termination pay under the ESA, subject to Ocular’s claim it had cause to terminate her employment, which remained the outstanding issue for trial.

Significantly, the judge did not explain how Coutinho could possibly be entitled to statutory notice in light of the clear language of the IDEL Regulation that extinguished any claim for constructive dismissal under the ESA. This may be an issue explored if the decision is appealed. However, given the relatively low value of the claim the employer may choose to forego an appeal.

Even if this decision is not appealed, it may have limited impact on employers for two reasons. First, if an employee has been laid off for a prolonged period of time (*i.e.*, more than a few months), without making any objection, the employer may successfully argue the employee acquiesced to the layoff. This is because in order to establish constructive dismissal an employee must object to a unilateral change to the terms of employment within a reasonable period of time. Second, many layoffs during the pandemic resulted from forced closure of a business due to a government order. The *Coutinho* decision did not comment on how a constructive dismissal claim arising in that particular scenario would be addressed.

## **Lessons for Employers**

### ***1. COVID-19 may not be accepted as exceptional***

The court was not satisfied the exceptional nature of the COVID-19 pandemic justified a broad and liberal reading of the IDEL Regulation such that it could extinguish a common law constructive dismissal claim. A similar result was reached in a recent Alberta decision, *Kotsteckyj v. Paramount Resources Ltd.*<sup>2</sup> In that case, the Alberta Court of Queen’s Bench held that a reduction in compensation (16-20%) resulting from a COVID-19 cost savings program was a constructive dismissal. In both decisions, the court applied a traditional constructive dismissal analysis and was not prepared to consider the unprecedented impact COVID-19 has had on Canadian employers.

### ***2. An employment agreement can reduce risk***

Had Coutinho’s employment been governed by a written employment agreement that gave Ocular the right to temporarily layoff Coutinho, or had Coutinho consented to the layoff, this claim could have been avoided. This is because, absent an express or implied provision in the employment contract, or consent, there is no right to layoff at common law.

---

<sup>2</sup> 2021 ABQB 225

Historically, most employment agreements have not included a layoff provision. However, moving forward, this may not be the case. We recommend that every employer review their employment contracts and consider including a layoff provision. **But, please do not simply change your employment agreements without legal advice, as a unilateral change of this nature may be unenforceable.** Contact experienced employment counsel who can help you determine the most effective way to proceed.

**To learn more about constructive dismissal in the context of COVID-19, contact your Sherrard Kuzz lawyer or any member of our team at [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com).**

*The information contained in this briefing note is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This briefing note is current as of **May 2021** and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the presentation/article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.*

