CASE IN POINT: CONSTRUCTIVE DISMISSAL

# Ontario courts debate COVID layoffs and constructive dismissal

*Is infectious disease emergency leave a constructive dismissal in court? Two Ontario judges say yes, but a third says no*

## BACKGROUND

Canada, and rest of the world, continues to be consumed with adapting to COVID-19. Early in the pandemic, many employers were forced to lay off staff. At least 18 months into the pandemic, layoffs remain part of the employer's toolkit and most Canadian jurisdictions have passed legislation extending the right of employers to issue temporary layoffs for reasons related to the pandemic. However, that right has become less certain as recent court decisions in Ontario have gone back-and-forth over employers' common-law right to lay off workers.

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**IN THE** absence of express contractual authority to lay off, employers have always been liable to complaints or lawsuits for constructive dismissal. Most provincial governments attempted to mitigate that risk in May 2020 by introducing legislation allowing employers to temporarily lay off employees for reasons related to the pandemic. In Ontario, the legislature added Infectious Disease Emergency Leave (IDEL) into the Employment Standards Act, 2000 (ESA). However, Ontario courts have been engaged in a debate over whether IDEL could still constitute constructive dismissal.

The intent of IDEL was, in large part, to shield employers from liability for laying off without express contractual authority. The question that arose in May 2020 — and remains to this day — is whether IDEL insulated employers from court claims, as well as Ministry of Labour complaints.

Ontario employers in particular continue to wait for definitive guidance from the province's legislature or the courts, despite recent court decisions dealing with this question.

### Dual regimes

Under Ontario law, an employer may terminate without cause by providing lawful notice of termination and, if applicable, severance pay. Employers may specify an employee's entitlement to notice in a written contract of employment, provided the employer complies with the minimum requirements under the ESA. Those minimums include: notice or termination pay ranging from one to eight weeks, depending on years of service; and severance pay if the employer's annual payroll exceeds $2.5 million and the employee has at least five years of service. If payable, severance is one week's wages for each year of service to a maximum of 26 weeks.

In the absence of a valid contract, the employee's entitlement to notice is determined by what is reasonable under the common law, which includes the ESA minimums. Reasonable notice will vary with the circumstance of each case but will always exceed the minimums. Employees must sue in court to recover damages for the failure to provide reasonable notice.

The dual regimes under the ESA and common law work in concert, but they can be confusing for employers and practitioners unfamiliar with employment law. Effectively, employees have a choice upon dismissal — they can file a complaint with the Ministry of Labour to enforce their minimum entitlements, or start a lawsuit in court for common-law reasonable notice. The ESA prohibits the employee from doing both.

> IDEL provisions continue to be in place and, in fact, have been extended by the Ontario government and in other jurisdictions.

### Constructive dismissal and COVID-19

The above principles apply if the employer dismisses the employee, or if the employer constructively dismisses the employee by unilaterally and substantially changing terms and conditions of employment.

Until the pandemic, an employer who temporarily laid off an employee in the absence of an express right to do so under a written employment agreement, or a clear past practice of laying off, constructively dismissed that employee. The layoff was considered a constructive dismissal for the purposes of ESA and common-law notice entitlements.

As noted, in May 2020, the Ontario government amended the ESA to create IDEL. A new regulation stipulated that a reduction of hours or wages — a layoff — due to COVID-19 was not a constructive dismissal but, instead, a protected leave of absence. The effect was to suspend the ESA rules around when a temporary layoff becomes permanent and requires payment of the ESA minimums. The trade-off was that employers would be obliged to reinstate employees to their jobs at the conclusion of the IDEL.

What the IDEL regulation did not stipulate, however, was whether a laid-off employee was also unable to sue under the common law for constructive dismissal. While it was clear that an employee could not claim termination and severance pay under the ESA in response to a COVID-19-related layoff, could they still sue in court for common law reasonable notice?

### Conflicting court decisions

Unfortunately, Ontario decisions have conflicted on the issue.

The first decision was *Coutinho v. Ocular Health Centre* in April 2021. Jessica Coutinho was employed as the office manager at an ophthalmology clinic called Ocular Health Centre. She was laid off in late May 2020. As there was no contract of employment expressly permitting the employer to lay off, Coutinho made a claim for constructive dismissal. Ocular defended the claim by arguing that her layoff was considered an IDEL and the ESA precluded a constructive dismissal claim under the ESA and the common law.

The court held that a COVID-related layoff did not prevent the employee from suing for damages in lieu of reasonable notice. The court relied on section 8(1) of the ESA which provides that "no civil remedy of an employee against his or her employer is affected by this Act." The court also relied on the Ministry of Labour's published guidance, which stated that the IDEL rules only applied to ESA entitlements, not the common law.

In June 2021, the court released *Fogelman v. IFG*. In that case, Gary Fogelman was placed on temporary layoff on March 16, 2020, due to the impact of COVID-19 on the business of his employer, IFG. The court came to the same conclusion as in *Coutinho*, again relying on Section 8(1). As Fogelman's action for constructive dismissal was to recover damages for the failure to provide reasonable notice of termination, his action did not relate to a claim under the ESA, the court said.

Days after *Fogelman*, the court released *Taylor v. Hanley Hospitality* and came to the opposite conclusion.

Candace Taylor was employed at a Tim Hortons franchise, owned and operated by Hanley Hospitality. She was laid off on March 27, 2020, as a result of COVID-19. She was recalled a few months later, but she

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pursued a court action for constructive dismissal.

The court rejected *Coutinho*, finding that the IDEL regulations were intended to benefit employers by allowing them to lay off for reasons related to COVID, without risk of liability for constructive dismissal. The court reasoned that to conclude otherwise would render the IDEL regulations meaningless:

"All temporary layoffs relating to COVID-19 are deemed to be IDELs retroactive to March 1, 2020 and prospective to the end of the COVID-19 period. As such, the plaintiff's layoff is no longer a layoff. It is an IDEL and the normal rights for statutory leaves are applicable (e.g. reinstatement rights, benefit continuation). This means any argument regarding the common law on layoffs has become inapplicable and irrelevant."

According to the court, section 8(1), relied on by the court in *Coutinho* and *Fogelman*, simply establishes that the ESA is not the exclusive forum for addressing matters under the legislation. It does not operate to preserve the ability to sue for constructive dismissal in the face of the IDEL regulation.

The court also found that the ESA can and does displace the common law. The employee cannot be on a leave of absence for the purposes of the ESA and yet be terminated for common law purposes. Such a result would be absurd and would effectively render the IDEL provisions meaningless.

"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," said the court in dismissing Taylor's claim. "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."

There is no denying the ring of common sense reflected by the court in *Hanley*.

**Employer takeaways**

IDEL provisions continue to be in place and, in fact, have been extended by the Ontario government and in other jurisdictions. Layoffs continue to be a viable risk mitigation strategy for many employers. At this stage of the pandemic, vaccine refusal is a significant issue that many employers must contend with. Under the circumstances, IDEL may be an option.

However, the ambiguity surrounding whether IDEL can constitute a constructive dismissal for common law purposes complicates the matter. Did the legislature really intend the IDEL mechanism to only preclude ESA claims, or was it meant to be a complete solution for employers to avoid the constructive dismissal consequences of a COVID-19 layoff?

Until an appeal court rules on the issue or the legislature clarifies things, the queue of constructive dismissal actions continues to grow.

**For more information, see:**

- *Coutinho v. Ocular Health Centre*, 2021 ONSC 3076 (Ont. S.C.J.).
- *Fogelman v. IFG*, 2021 ONSC 4042 (Ont. S.C.J.).
- *Taylor v. Hanley Hospitality*, 2021 ONSC 3135 (Ont. S.C.J.).

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