

CONSTRUCTIVE DISMISSAL? NOT IDEAL IF IDEL

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The Ontario Superior Court recently released an endorsement in *Taylor v. Hanley Hospitality*, 2021 ONSC 3135, which dealt with O. Reg. 228/20 Infectious Disease Emergency Leave ("IDEL"). The Regulation was enacted as a temporary measure by the Ontario government on May 29, 2020 in light of the COVID-19 pandemic, and deems temporary layoffs relating to COVID-19 to be IDELs, retroactive to March 1, 2020 and prospective until September 25, 2021. This decision provided much needed guidance on how constructive dismissals are impacted by IDEL.

What is IDEL?

IDEL is an unpaid, job protected leave of absence under the Ontario *Employment Standards Act, 2000* ("ESA"), which may be taken for specified reasons related to a designated infectious disease. COVID-19 is currently the only disease for which IDEL may be taken at this time. My colleague, Andrea M. Marsland, previously wrote about IDEL [here](#).

When Ontario enacted emergency measures in response to COVID-19, many employees were laid off in response to the restrictions placed on businesses. In normal times, employees whose hours or wages were reduced or eliminated could have been considered to be statutorily laid off under the ESA or constructively dismissed, **if their employment contracts did not allow for layoffs under the ESA**. However, O. Reg. 228/20 deemed non-unionized employees whose wages or scheduled hours were reduced or eliminated by the employer due to the effects of COVID-19 as being on IDEL.

Is Deemed IDEL Considered a Constructive Dismissal?

In *Taylor v. Hanley Hospitality*, the Court moved away from its decision in [Coutinho v. Ocular Health Centre Ltd.](#), 2021 ONSC 3076, which was released in April, regarding the effects of IDEL and constructive dismissal claims. The Court in Taylor dismissed the Plaintiff's claim for constructive dismissal based on the finding that all temporary layoffs related to COVID-19 are deemed to be IDELs, retroactive to March 1, 2020 and prospective to the end of the COVID-19 Period. The Court concluded that the Regulation changed the common law, and that it can do so. Further, the Court considered the extraordinary circumstances for the deemed IDEL, and that the intent of the deemed IDEL was to limit employers from being exposed to claims of common law constructive dismissal claims.

What Does This Mean For Employers?

Justice Ferguson took notice that Canadians have had many interruptions in their work due to the pandemic and the ensuing Regulations that forced many businesses to close or restrict their operations. Considering this context, the IDEL Regulation was a measure taken to solve the problem that the legislature created with respect to the increased layoffs that would occur due to forced business closures. As a result, the legislature's intention was to remove exposure from employers to claims of common



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law constructive dismissal. In analysing this, Justice Ferguson held that Coutinho had been wrongly decided as it offended rules of statutory interpretation and essentially rendered the legislation invalid.

Key Takeaways

Employers can rest easy knowing that employees who were laid off and deemed to be on IDEL cannot bring a claim for constructive dismissal on this point. That being said, if an employee is laid off in the normal course of business and their employment contract is silent on layoffs, **employers remain exposed to a common law claim for constructive dismissal**. Employers are encouraged to ensure they have proper wording regarding layoffs in all of their employment contracts to mitigate this risk.

Please reach out to the Fogler's employment group directly with any questions.

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