

Legal Corner

Is an employee layoff still a constructive dismissal during the COVID-19 pandemic?

Due to the COVID-19 outbreak and government mandated shutdowns, temporary layoffs shot up exponentially throughout 2020. Employers laid off staff in great numbers with the promise that they would return when the outbreak was lessened. In some provinces, we are still waiting.

On May 29, 2020, the Ontario Government issued the Infectious Disease Emergency Leave (“IDEL”) regulation under the *Employment Standards Act 2000* (“ESA”). The regulation provides that a temporary reduction or elimination of an employee’s hours and/or wages for reasons related to COVID-19 does not constitute a constructive dismissal. IDEL was meant in part to protect employers from claims for constructive dismissal by employees on temporary layoff. Under the ESA (and in the Canadian common law/judge made law), an employee is constructively dismissed if the employer makes significant changes to the employee’s terms and conditions of employment without the employee’s consent, including a reduction in hours or wages.

This IDEL legislation stopped claims for constructive dismissal under the ESA. It was unclear whether the legislation prevented an employee from claiming constructive dismissal under the Canadian common law against an employer when temporarily laid off during COVID-19.

In 2021, the Ontario Courts provided the first judicial pronouncement on the interaction between the IDEL regulation, the ESA, and common law remedies regarding constructive dismissal during COVID-19. The cases are conflicting. In the first case, the Plaintiff employee, employed by the Defendant, was advised that due to the impact of the pandemic, she would be placed on temporary layoff without pay. The Plaintiff employee brought an action against the Defendant employer seeking damages of \$200,000.00 for constructive dismissal.

There are both common law and statutory entitlements for constructive dismissal when there has been a temporary layoff without pay. Prior to the pandemic, the law was well established that a layoff without pay can constitute a constructive dismissal. In light of the pandemic, the Defendants argued that the law had changed - those temporary layoffs could not constitute constructive dismissal during COVID-19 pursuant to the IDEL regulation. The Court ruled that while it may be the case that the IDEL regulation prevented employees from claiming they were constructively dismissed under the ESA, the regulation does not affect civil remedies – including the common law right to sue for constructive dismissal. As held by the Court, a unilateral layoff constitutes a constructive dismissal, even in light of the IDEL regulation. The Employer is liable for damages for wrongful dismissal.

For an employer, this is very bad news. Damages for constructive dismissal can include up to two years of wages in some cases. If an employer has laid off a few employees, this could be crippling. Two subsequent cases have been heard in Ontario: one agreed with this decision, and one did not. The matter is currently under appeal.

Across Canada, the pandemic has seriously impacted employment relationships and the pocketbooks of employers and employees. This is only one difficult issue of many created by the pandemic and the jury is still out in terms of liability.

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