CASE IN POINT: CONSTRUCTIVE DISMISSAL

COVID-19-related temporary layoff a constructive dismissal: Ontario court

Ontario ESA separates legislative rights and civil remedies, leaving the door open to common law liability for pandemic emergency leave

BACKGROUND

Many employers have had to take measures to reduce costs during lockdowns as the COVID-19 pandemic marches on. Many provincial governments have passed legislation allowing employers to temporarily lay off employees or cut their pay. However, this doesn't mean employers are free from liability for constructive dismissal, as a recent Ontario court decision has demonstrated.

BY PRIYA SARIN

A RECENT decision of the Ontario Superior Court 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 province's 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 that a reduction of hours or wages for a COVID-19-related reason from March 1, 2020 to 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 Ontario court decision, the answer is yes.

What happened?

Jessica Coutinho was employed with Ocular Health Centre Ltd. as an office manager at one of its two clinics in Ontario. A dispute arose between the principals of Ocular and the doctors practicing out of its Cambridge, Ont., clinic where Coutinho worked. The dispute related, in part, to an allegation that the doctors were not adhering to proper COVID-19 protocols. On May 1, 2020, Ocular closed its Cambridge office. Initially, the company continued to pay Coutinho, but on May 29, it informed her that she would be placed on temporary layoff and recalled as soon as possible.

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

> Despite the emergency leave regulation, there was still a question of whether a layoff or reduction in hours related to COVID-19 could be common law constructive dismissal.

The claim proceeded by way of summary judgment motion, and the court considered two issues: Did the IDEL regulation preclude a claim for constructive dismissal at common law, and 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 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 or hours, or a 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 s. 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 layoff 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 that "these 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 that 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 lawsuit. In other words, Coutinho had jumped the gun in taking the position that 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 being laid off. The

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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 forgo 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 (more than a few months) without making any objection, the employer may successfully argue that 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

COVID-19 may not be accepted as exceptional. The court was not satisfied that the exceptional nature of the 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.*, where the Alberta Court of Queen's Bench held that a reduction in compensation (16 per cent to 20 per cent) 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.

An employment agreement can reduce risk. Had Coutinho's employment been governed by a written employment agreement that gave Ocular the right to temporarily lay her off, 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.

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 do not simply change your employment agreements without legal advice, as a unilateral change of this nature may be unenforceable.

For more information, see:

- *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 (Ont. S.C.J.).
- *Kotsteckyj v. Paramount Resources Ltd.*, 2021 ABQB 225 (Alta. Q.B.).

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