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Court of Appeal Declines to Decide if COVID-19-Related Temporary Layoff Can Constitute a Constructive Dismissal at Common Law

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In the May of 2021 decision of *Coutinho v. Ocular Health Centre*, the Ontario Superior Court ruled a COVID-19-related temporary layoff deemed to be an Infectious Disease Emergency Leave ("IDEL") under the province's *Employment Standards Act, 2000* ("ESA") could constitute a constructive dismissal under the common law[1].

Six weeks later, in *Taylor v Hanley Hospitality Inc.* the same court (different judge) ruled the exact opposite[2] dismissing the initial decision as "wrong in law" and lacking in "common sense" (discussed in our June 9, 2021 briefing note).

Hanley made its way to the Court of Appeal and in a decision released May 12, 2022, the court allowed the appeal on procedural grounds. Significantly, the court declined to rule on the substantive issue of whether a COVID-19 related temporary layoff under the ESA could constitute a constructive dismissal at common law. The matter was sent back to the lower court to be reheard. The decision of the Court of Appeal therefore provides no clarity for employers or employees on this important and contentious point of law.

Brief overview of the issue

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 ESA which deemed any employee laid off for a COVID-19-related reason to be on IDEL (the "IDEL Regulation").

The IDEL Regulation specifically states a reduction of hours or wages for a COVID-19-related reason between March 1, 2020 and September 4, 2020 (since extended to July 30, 2022) 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.

[1] 2021 ONSC 3076 (*Coutinho*)
[2] 2021 ONSC 3135 (*Taylor*)

> 2. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease….

While the IDEL Regulation settled the matter with respect to a constructive dismissal under the ESA, the question remained: *could a layoff or substantial reduction in hours related to COVID-19 still constitute a constructive dismissal at common law?*

According to the *Coutinho* decision, the answer was, 'yes'.

In that case, the employer argued 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.

The judge rejected this argument concluding that while the IDEL Regulation precluded a claim of constructive dismissal under the ESA, it did not affect an individual's right to pursue a common law claim. Relying on section 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 [the employer] with the section of the statute which unequivocally provides that an employee's civil remedy against her/his employee shall not be affected by any provision of the Act.

The judge also quoted from a publication of 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".

Same issue – different result

Rejecting the result in the *Coutinho* decision as "absurd", the motion judge in *Hanley* ruled the court could and should take judicial notice of the exceptional nature of COVID-19 and its impact on Canadian business and employment; something the previous decision did not consider.

The motion judge's reasons are summarized as follows:

- in response to a global pandemic, the legislature declared a state of emergency and required employers to cease or curtail their operations
- various levels of government undertook a variety of evolving emergency measures to attempt to mitigate the effects of the pandemic; those measures included the complete closure of certain businesses and restrictions on how certain businesses can operate
- through no choice of their own, some employers had to temporarily close their businesses or cut back their operations, laying off employees and/or reducing employee hours

- this exposed employers to claims of statutory and common law constructive dismissal
- to avoid those consequences, the legislature enacted the IDEL Regulation which expressly states an employee whose hours of work are temporarily reduced or eliminated, or whose wages are temporarily reduced, for reasons related to COVID-19, is not considered to be on a layoff, but on a statutory IDEL leave
- section 8 of the ESA does not prevent the ESA from displacing the common law; section 8 merely confirms that the ESA does not establish an exclusive forum to seek redress for issues involving the ESA; this was confirmed by the Court of Appeal for Ontario[3] in an earlier decision in which the court stated, "Simply put, statutes enacted by the legislature displace the common law," and it is a "faulty premise that the common law continues to operate independently of the ESA"
- the IDEL Regulation can and did change the common law; and any argument regarding the common law and layoffs is therefore "*inapplicable and irrelevant*"

Concluding "it should be obvious to the world what the legislature's intention was", the motion judge wrote:

> The employee cannot be on a leave of absence for ESA purposes and yet terminated by constructive dismissal for common law purposes. That is an absurd result.
> …
> I agree with [the employer] that exceptional situations call for exceptional measures. 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. If they did not take action, these claims would only serve to make the economic crises from the pandemic even worse. It is just common sense. The plaintiff's action is dismissed.

Court of Appeal weighs in (sort of)

Shortly after the *Hanley* decision was released, the plaintiff appealed on the basis the motion judge erred in two key ways:

1. By dismissing the action on a Rule 21 motion (determination of a question of law) when there were material facts in dispute, including whether the plaintiff had been laid off for reasons related to COVID-19[4] and/or agreed to the layoff, and
2. By concluding the IDEL Regulation displaced the common law right of action for constructive dismissal.

The Court of Appeal allowed the appeal on the first issue on procedural grounds. Under a rule 21 motion, the court is to assume the allegations in a statement of claim are true. The motion judge did the opposite. She accepted the allegations in the statement of defence as admitted facts because the plaintiff had not filed a reply. However, in this case the plaintiff was under no obligation to file a reply because her version of events was already set out in the statement of claim. This was an error in law which resulted in the court basing its decision on facts which were still in dispute.

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[3] *Elsegood v Cambridge Spring Service (2001) Ltd*, 2011 ONCA 831.

[4] The plaintiff alleged she was laid off for reasons unrelated to COVID-19.

The court also ruled that while judicial notice could be taken of the pandemic and state of emergency, it was not open to the motion judge to take judicial notice of a litany of other facts concerning the impact of the pandemic, the government's various emergency measures, and the intention of those measures. The matter was therefore sent back to the Superior Court of Justice for determination.

On the second ground, the Court of Appeal declined to rule on the legislative interpretation question despite both parties expressly requesting it do so to provide guidance to employers and employees. Instead, the court remitted the litigation back to the Superior Court for a determination on a full factual record. To this end, the court urged the parties to consider giving a notice of constitutional question to the Attorney General of Ontario so the court could benefit from submissions from the Attorney General regarding the legislative intent and context of the provisions.

Bottom line

Unfortunately, this ruling provides no clarity to employers on whether the IDEL Regulation precludes a common law constructive dismissal claim. This will undoubtedly be a question the Ontario Superior Court will revisit yet again, either through the *Hanley* litigation or one of many similar claims filed since the outset of the pandemic.

By declining to address the statutory issue, and inviting the parties to engage the Attorney General for Ontario, the court has bought itself time to receive and consider more and better submissions. We will keep our readers apprised of future decisions on this important issue.

To learn more, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com.