

May 25, 2021
Number 1667

Don't Take It Personally: Wrongful Dismissal Claim Against Corporate Directors 2

Progress of Legislation

British Columbia ... 3

Manitoba 5

Quebec 6

Saskatchewan 8

Recent Cases 9

Worth Noting 14

AN IMPORTANT RULING FOR EMPLOYERS ON CONSTRUCTIVE DISMISSAL AND THE IDEL

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At long last, the impact of Ontario's Infectious Disease Emergency Leave ("IDEL") on employee constructive dismissal claims has been litigated. Employment lawyers have been speculating for a long while about how courts will treat the various employment pivots employers were required to make during the pandemic. We now have our first answer.

On April 27, 2021, the Ontario Superior Court of Justice released its decision in *Coutinho v. Ocular Health Centre Ltd.*, [2021] O.J. No. 2237, 2021 ONSC 3076, and ruled that the IDEL does not take away an employee's ability to sue for constructive dismissal.

What's Constructive Dismissal?

A constructive dismissal occurs when an employer unilaterally and substantially changes an express or implied term of the employee's contract. The term also needs to have been essential. Changes regarding pay, duties, hours of work etc., can all potentially be constructive dismissals.

In the case of the pandemic, many employers had to cut their employees' hours and/or pay. As was the case in the *Coutinho* decision, the employer stopped paying the employee altogether, placing her on a layoff.

An employer can only lay an employee off without risking constructive dismissal where they have the employee's agreement to do so.

What's the IDEL Got To Do With It?

The Ontario government attempted to mitigate the risk that employers would get hit with constructive dismissal claims arising from their need to shut down by introducing the IDEL.

Infectious Disease Emergency Leave, O Reg 228/20, which legislated the IDEL, establishes that there is no constructive dismissal under the *Employment Standards Act, 2000* ("ESA") where an employee's wages or hours of work are temporarily reduced or temporarily eliminated by their employer for reasons related to COVID-19 from March 1, 2020, to July 3, 2021.

The *Coutinho* decision establishes that the above protections are against constructive dismissal under the ESA ONLY. Employees may still bring constructive dismissal claims under the common law.

But My Employees Agreed!

In order to be successful in their constructive dismissal claims, employees needed to have objected to the changes made to their employment. In many cases, this may not have

happened. Employees may have explicitly agreed to be laid off, or to work for less money, or they may have acquiesced to the changes by just continuing to work and not raising objections. In the *Coutinho* case, the employee objected to her layoff right away.

If your employees agreed to changes necessitated by COVID, they may not have good constructive dismissal claims.

If you have questions about the risk of constructive dismissal claims from your employees, or general questions about how to manage your evolving business needs during the pandemic, [get in touch](#) for a consultation!

Hilary Page practices employment, labour and human rights law. She provides practical advice on all things workplace law to employers and employees.

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