

# Infectious disease emergency leave now a defence to common law constructive dismissal claims in Ontario

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## Background

Last month, [BLG published a bulletin](#) on possible defences available to employers against constructive dismissal claims in light of the Ontario Superior Court's decision in *Coutinho v Ocular Health Centre Ltd.* In *Coutinho*, released on April 27, 2021, Justice Broad considered Ontario Regulation 228/20 issued under the Employment Standards Act, 2000 (the ESA). The regulation deems an employee on temporary layoff due to COVID-19 to be on a job-protected infectious disease emergency leave (IDEL). Justice Broad found that the regulation did not restrict a plaintiff's common law right to treat a temporary layoff as a constructive dismissal. In Justice Broad's view, the regulation only stated termination under the ESA. This decision was surprising to employers as government orders, and regional directives relating to the COVID-19 pandemic forced many to reduce employee hours or implement temporary layoffs.

## Ontario Court Disagrees with Coutinho

Fast forward a few weeks, and a new Ontario Superior Court decision released on June 7, 2021, *Taylor v Hanley Hospitality Inc.*<sup>1</sup>, turns *Coutinho* on its head, holding that it "is wrong law." In *Taylor*, the Court found that the plaintiff was not constructively dismissed when her employer placed her on IDEL. Justice J.F. Ferguson asserted that Ontario courts have "never said that the [ESA] does not or cannot displace the common law." The Ontario Court of Appeal addressed this point directly in *Elsegood v Cambridge Spring Service (2001) Ltd.* when it wrote: "Simply put, statutes enacted by the legislature displace the common law." Accordingly, Justice Ferguson held that the regulation "can and did change the common law."

Justice Ferguson added that it is essential to remember the following context:

- (a) the legislature created the “problem” when it triggered the state of emergency and required employers to cease or curtail their operations;
- (b) the legislature forced employers to lay off employees or reduce their hours;
- (c) in doing so, the legislature exposed the employers to claims of common law constructive dismissal;
- (d) the legislature amended the ESA and created the regulation to avoid those consequences;
- (e) the legislature solved the very problem it had created and took away the exposure that arose from its action; and
- (f) it should be obvious to the world what the legislature’s intention was by doing so.<sup>2</sup>

Justice Ferguson concluded that Coutinho was not binding on the Court in the present case because it did not consider these factors and wrongly applied the law. As a result, the Court dismissed the plaintiff’s constructive dismissal action.

## Final thoughts

While the Taylor decision is welcome news for many employers, the law is not settled. There are now two conflicting cases at the same level of court, which creates uncertainty concerning whether placing an employee on IDEL constitutes a constructive dismissal at common law. Whether this ambiguity will be clarified on appeal or through additional decisions on this issue remains to be seen.

It is also important to note that the IDEL provisions that suspend the effect of layoffs expire on September 25, 2021. Accordingly, unless extended by the government, the IDEL defence to constructive dismissal will only be available for reductions of hours or temporary layoffs that have taken place from March 1, 2020 to September 25, 2021.

<sup>1</sup> 2021 ONSC 3135 (Taylor).

<sup>2</sup> Ibid at para. 21 (xiii).

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