Infectious disease emergency leave and common law constructive dismissal claims

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Background

As the pandemic lingers on in Canada, the legal consequences of many of the statutory changes made by governments are beginning to be litigated in court.

On March 19, 2020, the Ontario *Employment Standards Act, 2000* (ESA) was amended to include infectious disease emergency leave (the IDEL), retroactive to January 25, 2020. Amongst othe things, the IDEL granted a statutory leave to employees who were exposed to COVID-19 and needed to quarantine. On May 29, 2020, the Ontario government extended the application of the IDEL and had it apply to all employees who had been laid off due to COVID-19. Those employees were deemed to be on IDEL and, therefore, the automatic termination provisions under the ESA that would have applied at the end of the layoff were suspended. As of May 2021, that is still the state of the law for the purpose of the ESA. Deemed leaves are set to expire on July 3, 2021.

While it is clear that the May 29, 2020, amendments relieve against the layoff provisions under the ESA, the question remained as to common law rights. Subject to contract and practice, a layoff at common law generally constitutes a constructive dismissal. Do the amendments creating the IDEL also limit an employee's common law right to treat a layoff as a constructive dismissal? The Ontario Superior Court of Justice addressed this question in *Coutinho v. Ocular Health Centre Ltd.* on April 21, 2021.

Decision

On May 29, 2020, Ms. Coutinho was temporarily laid off from her position as an office manager at Ocular Health Centre Ltd (Ocular). Three days later, she commenced an action against her employer for constructive dismissal, seeking her common law and statutory entitlements. Ocular took the position that the reduction or elimination of Ms. Coutinho's hours did not constitute a constructive dismissal pursuant to the IDEL and she did not have a cause of action.

In the result, Justice Broad found that provisions of the IDEL did not restrict Ms. Coutinho's common law right to treat a temporary layoff as a constructive dismissal.

Effectively, the court held that the amendments to the ESA deal with rights under the ESA. The ESA expressly preserves civil remedies. For example, section 8(1) of the ESA provides that no civil remedy of an employee against his or her employer is affected by the ESA. In other words, if the Ontario government also wanted to impact common law rights, it would have done so expressly. Since it did not, Ms. Coutinho's common law rights were preserved.

Available defences

In our view, *Coutinho v. Ocular Health Centre Ltd.* was argued on very narrow grounds and stands for a narrow proposition. Although it will almost certainly inspire a number of constructive dismissal claims, many defences remain available to employers. We briefly discuss some of those, which were not raised in the decision, below.

Condonation

The doctrine of condonation specifies that where an employee is notified of a reduction or elimination of hours by the employer, and chooses not to object, assert their common law rights, or allows an unreasonable amount of time to pass before acting, the employee is considered to have waived the wrongdoing in question. In *Coutinho v. Ocular Health Centre Ltd.*, the employee commenced a legal action mere days after receiving the notice of layoff. In the context of the COVID-19 pandemic, many employees have been laid off for over a year. These employees may be found to have condoned the layoff and IDEL.

Past practice of laying off employees

A closely related argument, where an employer has established a practice of laying off and recalling employees who do not object or assert their common law rights, offers a second defence to those employers who have been forced to layoff and recall employees over the course of the pandemic. This defence may be available even over the course of the pandemic. Employers in various industries, including restaurants and retail, have been forced to layoff and recall employees as the situation has evolved over the past 14 months. These employers may have established a practice even over the course of the pandemic.

Contractual right to layoffs

An express term in an employment contract permitting temporary layoffs will provide a defence to a constructive dismissal claim. Although rare at the start of the pandemic, these clauses are becoming standard terms.

Doctrine of frustration

The doctrine of frustration may apply. Pursuant to this doctrine, a court may fully excuse both parties from their obligations under an employment contract where performance of that contract becomes legally or physically impossible. The contract is said to be "frustrated" without fault of either party. In the context of broad emergency orders that closed many businesses, or partially closed those businesses, the doctrine of frustration

will provide a very strong defence to common law claims of constructive dismissal. Again, many employers were required to shut down by government orders. Their employment contracts became impossible to perform because of those orders and because of the COVID-19 pandemic.

Implied right to layoff at common law

Although a novel defence, it should be noted that courts are not new to weaving implied terms into employment contracts. After all, the concept of reasonable notice at common law is a judicial creation of an implied term. In the context of a global pandemic that initially (and sporadically) shut down a large swath of the global economy, perhaps there is room for an implied term in employers' favour.

Conclusion

None of the above defences were advanced in *Coutinho v. Ocular Health Centre Ltd.* and, in fairness, some were not available on the facts of that case. Although the case will no doubt inspire more constructive dismissal litigation, there are many defences yet to be tested.

It should also be noted that the decision is based on a reading of the Ontario ESA and the outcome will differ from province to province. For example, in Quebec, the *Act Respecting Labour Standards* (the ARLS) provides that employers may layoff employees temporarily for a maximum of six months without having to pay any statutory indemnity in lieu of notice, where justified by the circumstances (*e.g.* temporary economic difficulties). In the context of regular employment, any temporary layoff could nonetheless be construed as a constructive dismissal without proper justification. However, in the event such layoff is justified, the chances of success of a constructive dismissal will be very limited, since the courts must consider the application of the ARLS.

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