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

June 10, 2021

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.*[1], 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.[2]

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.

[1] 2021 ONSC 3135 (*Taylor*).

[2] *Ibid* at para. 21 (xiii).

By

Robert Weir

Expertise

Labour & Employment

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.