

Infectious Disease Emergency Leave And Wrongful Dismissal



Ontario employees on temporary layoff (or on reduced hours) due to COVID-19 are currently deemed to be on Infectious Disease Emergency Leave ('IDEL') under the *Employment Standards Act* (the 'ESA'), but may nonetheless claim that they have been 'constructively dismissed' under the common law, entitling them to wrongful dismissal damages. This has recently been confirmed by an Ontario Court in *Coutinho v. Ocular Health Centre Ltd.*¹

In normal (non-pandemic) circumstances, the *ESA* permits temporary layoffs, but only for a limited period of time, after which such layoffs are deemed to be a termination of employment. When the outbreak of COVID-19 and related safety measures resulted in the temporary layoff of thousands of employees, the Ontario government enacted a Regulation deeming employees on temporary layoff (or on reduced hours) to be on IDEL, meaning that their employment would not be deemed to be terminated under the *ESA*.

Under the common law, employers do not have the right to temporarily lay employees off from work or to unilaterally reduce hours, unless that right is expressly set out in a written employment agreement or has been clearly established by past practice, or the employee agrees.

The *Coutinho* decision confirms that the IDEL Regulation to the *ESA* has no effect on an employee's common law right to assert that their temporary layoff or reduction in hours amounts to a constructive dismissal, entitling them to damages for wrongful dismissal.

Ontario employees on temporary layoff or reduced hours due to COVID-19 may quit and claim damages against their employers for constructive dismissal. While this is not a surprise, it has now been clearly established in a decision of an Ontario Court. The question remains whether employees will prefer to pursue this option, rather than wait to be recalled to active and continued employment. An employee's entitlement to damages may also be limited if they are working elsewhere during their layoff or if they refuse a recall to active service.

Employers with employees on temporary layoff or reduced hours due to the pandemic should consult with their employment law counsel for advice on how to mitigate their potential liability, both now and in future offers of employment which squarely address these risks.

Footnotes

¹ See *Coutinho v. Ocular Health Centre Ltd.* (2021) ONSC 3076

by Peter C. Straszynski
Torkin Manes LLP