

# KEEPING CURRENT

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## Constructive dismissal claim resulting from temporary layoff not barred by Ontario COVID-19 Regulation

By James R.G. Cook

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In *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076, Justice D.A. Broad of the Ontario Superior Court of Justice dismissed an employer's motion for summary judgment which sought the dismissal of an employee's action for constructive dismissal arising out of a temporary COVID-19 lay-off.

The decision is the first known case which has judicially considered Ontario Regulation [228/20: Infectious Disease Emergency Leave](#) (the "IDEL Regulation") under the [Employment Standards Act, 2000](#) (the "Act"), which was in force from March 1, 2020, to July 3, 2020.

The plaintiff commenced employment in 2014 as an ophthalmic technician for the defendant employer, which operated several ophthalmic clinics in Ontario. In 2018 she had been promoted to office manager of one of the clinics.

On May 1, 2020, the plaintiff arrived for work and discovered that the clinic's locks had been changed. At the time the owners of the employer were involved in a dispute over corporate and business issues, and were accusing each other

of failing to impose COVID-19 physical distancing guidelines in the clinics.

The plaintiff went home to receive a telephone call from one of the owners advising that the clinic was closed but that she would be paid until further notice. She was told that if she discussed the conversation with the doctors she worked for at the clinic, that this would constitute cause for termination. She was told to expect a follow-up call during the following week, which did not occur.

On May 29, 2020, the plaintiff received a letter advising that her employer was forced to close the clinic where she worked, and that she was being placed on "temporary layoff." The employer stated that it would recall her to her position as soon as possible. This did not occur.

On June 1, 2020, shortly after receiving the notice of "temporary layoff," the plaintiff sued her former employer for damages for constructive dismissal.

By July 22, 2020, the plaintiff became re-employed at a new clinic operated by the doctors that she had formerly worked

for, at a greater annual salary. Notwithstanding that she was able to mitigate her damages by finding new employment, the plaintiff argued that her former employer had failed to comply with its duty under the [Act](#) to pay her six weeks' salary as termination pay commensurate with her six years of service.

The employer took the position that it intended to consolidate some of the clinic's practice into another clinic, and that it had offered to continue the plaintiff's employment, but that due to the COVID-19 health crisis it could not continue to employ all of the employees. For that reason, the plaintiff had been advised that she was being temporarily laid off.

The employer pleaded that, pursuant to the IDEL Regulation, the plaintiff was deemed to be on emergency leave and the temporary elimination of her employment duties and work hours did not constitute constructive dismissal. Rather, it argued that the plaintiff unilaterally terminated her employment and was deemed to have resigned.

The employer argued in the alternative that it had just cause to terminate the plaintiff's employment as she had allegedly falsified information respecting the hours worked by employees at the clinic, at the request of one of the doctors that she worked for.

On April 27, 2021, Justice Broad released an Endorsement dismissing a motion brought by the employer to have the plaintiff's action dismissed.

Justice Broad determined that it was not necessary to determine whether the plaintiff's hours of work were in fact eliminated for "reasons related" to COVID-19, as he found that there was no genuine issue requiring a trial with respect to the employer's defence that it was

relieved of liability for constructive dismissal by the [IDEL Regulation](#).

As a starting point, section [8\(1\)](#) of the [Employment Standards Act, 2000](#) provides that "no civil remedy of an employee against his or her employer is affected by this Act." While the employer argued that the unprecedented emergency brought on by the global pandemic ought to be the paramount consideration, Justice Broad found that the [IDEL Regulation](#) did not take away the unequivocal statutory right of an employee under section [8\(1\)](#) to pursue a civil remedy against their employer notwithstanding other provisions in the Act.

In support of this interpretation, Justice Broad noted that an online Guide of the Ontario Ministry of Labour to the IDEL Regulation, entitled "*Your Guide to the Employment Standards Act: temporary changes to ESA rules*," had a section called "Constructive dismissal" which specifically stated that "These rules do not address what constitutes a constructive dismissal at common law."

At common law, absent an agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and constitutes a constructive dismissal: *Elsegood v. Cambridge Spring Service (2001) Ltd.*, [2011 ONCA 831 \(CanLII\)](#) at para. [14](#).

The employer argued that since the plaintiff had commenced an action for constructive dismissal just two business days after receiving her notice of temporary layoff, rather than trying to find out when she might be called back to work, she had not actually been constructively dismissed.

There is, however, no obligation in Ontario law



for employees to make inquiries of an employer as to when they might be called back to work as a precondition to bringing an action for constructive dismissal. Rather, upon being constructively dismissed, an employee has an election to make regarding whether to continue to work, thereby accepting the constructive dismissal, or to treat the employer's breach/conduct as bringing the employment agreement to an end, and sue for constructive dismissal: *McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)*, [2020 ONCA 816 \(CanLII\)](#) at para. [24](#).

In Justice Broad's view, upon receipt of the written notice of May 29, 2020, the plaintiff was entitled to treat her employer's unilateral imposition of the closing of the clinic and temporary layoff as bringing her contract of employment to an end. The employer's conduct amounted to a constructive dismissal and the plaintiff was not barred by the IDEL Regulation from pursuing a common law action for constructive dismissal.

In the result, the employer's motion to dismiss the plaintiff's action was dismissed, and the action will continue to trial solely on the issues of whether the employer had just cause to dismiss the plaintiff for falsifying records, and, if so, whether the employer was thereby relieved of the obligation to pay the employee termination pay pursuant to the [Employment Standards Act, 2000](#).

Given the number of "temporary" layoffs that occurred during the course of the COVID-19 pandemic, it remains to be seen whether this decision leads to an onslaught of similar claims against employers who may have believed that they could rely on the IDEL Regulation as a basis to resist claims of constructive dismissal.

## Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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