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Court reaches opposite conclusion on whether constructive dismissal claims are barred by Ontario COVID-19 Regulations

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Employers may be relieved that in *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135 [not yet on CanLII], a second judge of the Ontario Superior Court of Justice reached an opposite conclusion to an earlier decision involving whether the common law of constructive dismissal applies to temporary layoffs notwithstanding Ontario Regulation 228/20: *Infectious Disease Emergency Leave* (the "*IDEL Regulation*") under the *Employment Standards Act, 2000* (the "Act").

As we previously discussed, 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. In *Taylor*, Justice J.E. Ferguson reached the opposite conclusion.

The *Coutinho* decision had not been released at the time of the hearing in *Taylor*, but lawyers for both the employer and employee made written submissions to Justice Ferguson while the decision was on reserve. *Coutinho* was, in Justice Ferguson's view, wrongly decided.

In the *Taylor* heard by Justice Ferguson, an employee of a Tim Hortons franchise was temporarily laid off on March 27, 2020. She did not resign. On August 18, 2020, the employee was advised in writing that she was being recalled to her position effective September 3, 2020. She returned to her employment. Nevertheless, she sued her employer arguing that her temporary layoff was a constructive dismissal.

Essentially the employee argued that the *IDEL Regulation* did not displace the common law doctrine that a layoff is a constructive dismissal, which was the decision reached by Justice Broad in the earlier *Coutinho* decision.

Unfortunately for the employee, Justice Ferguson did not agree, given "these times of COVID-19."

In the decision, Justice Ferguson took judicial notice of the fact that hundreds of thousands of Canadians had their employment interrupted as a result

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of the pandemic, and that businesses such as Tim Hortons were required by the Ontario Government to close their storefronts. The province undertook legislative measures to address employment impacts of the pandemic and emergency measures in order to mitigate the effects of the pandemic.

In the earlier *Coutinho* decision, Justice Broad found that the *IDEL Regulation* did not take away the unequivocal statutory right of an employee to pursue a civil remedy against their employer. Justice Ferguson, in contrast, found that the argument of the employee (and in turn the decision in *Coutinho*), did not make "common sense" and the rules of statutory interpretation were more properly read to mean that the employee was not constructively dismissed and that she was on "Infectious Disease Emergency Leave," by virtue of section 50.1 of the Act and the *IDEL Regulation*. As the employee had not actually been laid off, she could not argue that she had been constructively dismissed.

Justice Ferguson considered both that legislation can and does displace the common law, and that "the common law evolves as the changing times make it necessary to do so" to conclude that the *IDEL Regulation* precluded the employee from claiming constructive dismissal as a result of a temporary pandemic layoff.

As a result, the employee's action was dismissed.

Considering the deluge of potential claims which could result from the *Coutinho* interpretation of the *IDEL Regulation*, Justice Ferguson stated that had the Ontario Government not taken action to prevent the potentially tens of thousands of constructive dismissal claims, "these claims would only serve to make the economic crisis from the pandemic even worse."

The Government had identified the problem of impending constructive dismissal claims, and patched it up pursuant to section 7(1) of the *IDEL Regulation*. This section stated that a temporary reduction or elimination of an employee's hours or work, or a temporary reduction in an employee's wages "does not constitute constructive dismissal if it occurred during the COVID-19 period."

One would expect that the *Coutinho* and *Taylor* decisions will find themselves to be the subject of appeals. Given the opposite conclusions reached in the two decisions, an appellate court will likely have to provide more definitive and binding guidance on this issue which is sure to see further litigation in Ontario's lower courts.

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.

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