

UPDATE: INFECTIOUS DISEASE EMERGENCY LEAVE REGULATION AND CONSTRUCTIVE DISMISSAL AT COMMON LAW

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Since our previous article, the Superior Court released another decision regarding the interpretation of the Infection Disease Emergency Leave Regulation, O. Reg 288/20 ("IDEL").

In *Taylor v Hanley Hospitality Inc* 2021 ONSC 3135, the Plaintiff was temporarily laid off from her employment with the Defendant at the end of March 2020. In September 2020, the Plaintiff was recalled and returned to work.

The Court found that there was no dispute that the reason for layoff was for a reason other than one related to COVID-19. As such, the decision focused exclusively on whether the IDEL Regulation displaced the common law doctrine of constructive dismissal.

The Court sought submissions from the parties following the release of *Coutinho v Ocular Health Centre Ltd* 2021 ONSC 3076 and broadly endorsed the Defendant's submissions. Specifically, the Court agreed that the statutory interpretation used in *Coutinho* failed to give meaning to the purpose of the IDEL Regulation and never addressed the consequential analysis of its interpretation.

The Court also endorsed the Defendant's submissions on the applicability of the *Employment Standards Act, 2000*, and held that Section 8(1) of the Act simply ensured that there was no exclusive forum for seeking redress under the Act. Moreover, the Court agreed that with respect to matters under the Act, statutes could displace the common law and that the IDEL Regulation did exactly that with respect to constructive dismissal.

Taking judicial notice of the circumstances of COVID-19, the Court emphasized the context in which the IDEL Regulation was enacted. That is, in the midst of these exceptional situations, the Province was cognizant that its lockdown measures and state of emergency left employers vulnerable to claims of constructive dismissal. The IDEL Regulation was enacted to prevent further economic crisis. In the words of the Court, this approach to the Regulation was "just common sense."

As a result, we now have two conflicting decisions as to the proper application and interpretation of the IDEL Regulation as it relates to claims of constructive dismissal. Unless there is an amendment to the Regulation or Act clarifying these points, or an appellate court decides otherwise, there is uncertainty in Ontario law.