

Can Employees on Temporary Layoff Sue for Constructive Dismissal? – Quiz



Ontario court OKs constructive dismissal lawsuit of employee on Infectious Disease Emergency Leave (IDEL).

Temporary layoff provisions in employment standards laws are designed to save jobs by enabling employers to cut staff without incurring termination notice. The hope and expectation is that in the long run, employers will be able to recall employees on layoff after riding out the financial stresses that made the layoffs necessary in the short run. But if that doesn't happen before the temporary layoff deadline ends, termination becomes final and the employer must pay termination notice.

In response to the pandemic, most provinces temporarily extended the layoff deadline to give employers more of a breather and rescue jobs. The fly in the ointment is that employees on temporarily layoff (or whose hours have been temporarily slashed) may still be able to sue for constructive dismissal. The following scenario illustrates the interplay between employers' temporary layoff rights under employment standards laws and employees' constructive dismissal protections.

SITUATION

In response to the pandemic, Ontario adopted a temporary *Employment Standards Act* (ESA) regulation providing that employees on temporary layoff are considered to be on unpaid Infectious Disease Emergency Leave (IDEL) until July 3, 2021. In addition, employees on IDEL due to COVID-19 aren't allowed to assert their ESA constructive dismissal rights, i.e., claim that the employer committed constructive dismissal by putting them on IDEL. However, the IDEL regulation doesn't say anything about employees' constructive dismissal rights under "common law," that is, non-statutory law created by judges in court cases.

Scenario: An Ontario medical clinic employee sues his employer claiming it committed constructive dismissal by putting him on IDEL. We were only doing what the IDEL regulation says we're allowed to do, the employer responds. Besides, the regulation says people on IDEL can't bring constructive dismissal lawsuits.

QUESTION

Does the employee have a right to sue the employer for constructive dismissal?

1. Yes, because the IDEL regulation doesn't affect his common law constructive dismissal rights
2. No, because employees on IDEL can't sue for constructive dismissal
3. Yes, if the IDEL lasts longer than the maximum duration for a temporary layoff under the ESA
4. No, because being on IDEL means that he's technically still employed

ANSWER

1. Yes, the employee can sue for constructive dismissal under common law.

EXPLANATION

This situation, which is based on a recent Ontario case called *Coutinho v. Ocular Health Centre Ltd.*, (2021) ONSC 3076 illustrates that the temporary layoffs rules and bars on constructive dismissal under **the ESA** don't affect employees' constructive dismissal rights **under common law**. Note that while the *Coutinho* case is from Ontario, the same rules apply to other forms of temporary layoff in other jurisdictions.

Bottom Line: The employee can still take his claim to court regardless of what the IDEL regulation says and collect damages if he can prove that having his hours or salary cut as a result of being on IDEL amounted to constructive dismissal.

WHY WRONG ANSWERS ARE WRONG

B is wrong because employees have constructive dismissal protections under 2 different sets of laws—the ESA and common law—and the ESA bars apply only to the former.

C is wrong because the IDEL regulation bar on ESA constructive dismissal lawsuits does bar suits based on the length of IDEL and temporary layoff because those claims are based on the employee's ESA rights.

D is wrong because constructively dismissal lawsuits must always be initiated by employees who are still technically employed but leave and contend that they were effectively forced out by unilateral and unfavourable changes to their employment made by the employer. However, in the real world, employees who are on IDEL may choose not to sue for constructive dismissal because they still hope to get their job back. In other words, once the employee sues for constructive dismissal, their employment ends and the bridge is burned.