

# Can Temporary Layoffs Due To COVID-19 Be Considered Constructive Dismissal?

written by Tina Tsonis | September 28, 2021



During the COVID-19 pandemic, all Canadian provinces and territories declared a state of emergency and implemented strict measures to help curb the spread of the virus. Consequently, many businesses were directly or indirectly forced to lay off employees, reduce work hours, and even close their doors. Some of these actions, however, exposed employers to liability for constructive dismissal.

In response, many provincial governments, including Alberta, amended their employment standards legislation to permit temporary layoffs due to COVID-19 and related government restrictions.

The Alberta government amended the *Employment Standards Code* to allow temporary layoffs of up to 180 days for reasons related to COVID-19. In Ontario, the provincial government implemented *Regulation 228/20: Infectious Disease Emergency Leave*. The *Regulation* states that between March 1, 2020 and July 3, 2021 the temporary reduction or elimination of an employee's hours of work or wages for reasons related to COVID-19 is not considered to be a constructive dismissal. Instead, the employee would be deemed to be on an "Infectious Disease Emergency Leave."

## **Constructive Dismissal at Common Law**

It is a well-established common law rule that an employer has cannot unilaterally lay off an employee unless there is an explicit or implicit agreement to the contrary. Therefore, under the common law, a unilateral layoff will likely amount to a constructive dismissal.

The issue is whether a statutory layoff under a COVID-19-related provision still amounts to a constructive dismissal at common law. This issue arises because, for example, Alberta's *Employment Standards Code* states that nothing in the *Code* affects a right at common law. As a result, notwithstanding that the layoff is permitted by statute, the layoff may still amount to a constructive dismissal under the common law.

There are currently three decisions on this issue from the Ontario Superior Court. In *Coutinho v. Ocular Health Centre Ltd.* and *Fogelman v. International Financial Group Ltd.*, the Courts held that an Infectious Disease Emergency Leave is a constructive dismissal at common law. In contrast, in *Taylor v. Hanley Hospitality Inc.*, the Court held that an Infectious Disease Emergency Leave is not a constructive

dismissal at common law.

### ***Coutinho v. Ocular Health Centre Ltd. and Fogelman v. International Financial Group Ltd.***

In *Coutinho v. Ocular Health Centre Ltd.* and *Fogelman v. International Financial Group Ltd.*, both Courts held that an Infectious Disease Emergency Leave constituted a constructive dismissal at common law.

In these cases, the employers temporarily laid off the employees. The employers argued that the layoff was permitted by the *Regulation* as an Infectious Disease Emergency Leave and therefore did not constitute a constructive dismissal. On the other hand, the employees argued that there was nothing in Ontario's *Employment Standards Act* that prevented them from pursuing a claim for constructive dismissal at common law.

The Courts held that under section 8 of Ontario's *Employment Standards Act*, which states that no civil remedy is affected by the Act, the Infectious Disease Emergency Leave only prevents an employee from bringing a statutory claim for constructive dismissal. It does not affect an employee from bringing a civil claim under the common law for constructive dismissal, so the Courts awarded the employees damages for constructive dismissal at common law.

It is worth noting that the Court in *Fogelman* did not refer to the decision in *Coutinho*, which was released after the hearing in the *Fogelman* matter in January of 2021. Nor did *Fogelman* benefit from the judgment in *Taylor v Hanley Hospitality Inc.*, which was issued five days later.

### ***Taylor v. Hanley Hospitality Inc.***

In *Taylor v. Hanley Hospitality Inc.*, the Court held that the decision in *Coutinho v. Ocular Health Centre Ltd.* was wrong, and that an Infectious Disease Emergency Leave did not constitute a constructive dismissal at common law.

The Court held that Ontario's *Employment Standards Act* – particularly the Infectious Disease Emergency Leave – displaced the common law to permit temporary layoffs related to COVID-19. The Court also held that to rule otherwise would create an absurd result. An employee cannot be lawfully laid off under employment standards legislation and yet, at the same time, be constructively dismissed under the common law.

The Court noted that the government created this problem by effectively forcing employers to lay off employees. The Ontario government amended the *Employment Standards Act* due to the inherent unfairness of subjecting employers to lawsuits as a result of its strict emergency response measures. The Court stated that if the government needed to take action to prevent these claims from making the economic crisis caused by the pandemic even worse.

### **Takeaway**

Ontario now has three decisions on this issue that are not in harmony with one another – all from the same level of Court. It is still uncertain which direction the courts in Alberta will take, and as such, this is a significant issue to watch going forward. Many Albertan employers relied on COVID-19 measures to temporarily lay off employees while their businesses were forced to close or reduce capacity. How courts resolve this issue will determine whether employers are exposed to significant liability from constructive dismissal claims.

Employers should consider updating their employment agreements to include a standard temporary layoff provision confirming their right to implement a temporary layoff and confining it to the duration allowed under statute.

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