

# Compliance Alert: Can Employees You Put on Infectious Disease Emergency Leave Sue for Constructive Dismissal?

written by Rory Lodge | June 17, 2021



As in the rest of the country, COVID-19 financial challenges have forced many employers in Ontario to put employees on unpaid Infectious Disease Emergency Leave (IDEL). The good news is that unlike those in other jurisdictions, Ontario employers are insulated you against the risks of being sued for [constructive dismissal](#) as a result of these decisions. Specifically, the *Employment Standards Act* (ESA) Regulation that allows employers to treat employees on temporary layoff as being on IDEL until 25, 2021 also bans employees from filing ESA lawsuits claiming that being put on IDEL (or having their hours or pay cut temporarily due to COVID) amounts to constructive dismissal.

Or does it?

## **The Loophole in the Ban on Constructive Dismissal Lawsuits**

Because of the way it's worded, the ban on constructive dismissal suits contained in the IDEL Regulation contains a loophole. That's because in Ontario, there are actually 2 laws that give employees the right to sue for constructive dismissal:

- The ESA; and
- The "common law," that is, law outside the ESA based on court cases, including cases decided before the statute came into effect.

The IDEL Regulation addresses only constructive dismissal under the ESA. That begs the question of whether employees on IDEL can still sue for constructive dismissal under common law. Here's a look at how the only 2 courts to confront this issue so far have ruled.

## **EMPLOYEE ON IDEL CAN SUE FOR CONSTRUCTIVE DISMISSAL**

### **SITUATION**

An Ontario medical clinic suffering COVID-19 related difficulties placed an employee on IDEL. The employee sued for constructive dismissal. The ESA regulation made it

legal to put employees on IDEL, the employer argued. Moreover, it specifically says that people on IDEL due to COVID can't bring constructive dismissal lawsuits.

## **RULING**

The Ontario Superior Court of Justice found that the employee was constructively dismissed by being placed on IDEL.

## **EXPLANATION**

The IDEL Regulation applies only to an employee's right to sue for constructive dismissal under the ESA. But an employee not constructively dismissed under the ESA can still be constructively dismissed under common law. That's what happened in this case. So, the employer had to pay the employee damages.

[\*Coutinho v. Ocular Health Centre Ltd.\*](#), (2021) ONSC 3076

# **EMPLOYEE ON IDEL CAN'T SUE FOR CONSTRUCTIVE DISMISSAL**

## **SITUATION**

A Tim Hortons employee on IDEL sued for constructive dismissal. Tim Hortons claimed the lawsuit violated the IDEL Regulation.

## **RULING**

The Ontario Superior Court of Justice agreed and dismissed the case.

## **EXPLANATION**

The *Coutinho* ruling was wrong and we're not bound to follow it, said the court. Interpreting the IDEL Regulation as leaving the common law right of employees on IDEL to sue for constructive dismissal would be to render the regulation meaningless—something courts never want to do, especially during times of crisis where laws are adopted to deal with an urgent situation. Besides, the court continued, nobody ever said that the ESA can't displace common law; in fact, the Ontario Court of Appeal, the highest in the province, has said exactly the opposite.

[\*Taylor v. Hanley Hospitality Inc.\*](#), 2021 ONSC 3135 (CanLII), June 7, 2021

## **TAKEAWAY**

For now, at least, it remains uncertain whether employees on IDEL can sue for constructive dismissal. The *Coutinho* court says yes, constructive dismissal suits are still in play; the *Taylor* court says they're not. Such splits between courts are fairly common. The problem is that they leave the stakeholders in limbo. Thus, unless and until the case gets decided by the Ontario Court of Appeal, employers will have to factor the risk of constructive dismissal into their decisions about [whether to put employees on IDEL](#).