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Limited job search reduces worker's reasonable notice entitlement

Ontario worker's underwhelming mitigation efforts reduce period from 8 to 6 months

BY JEFFREY R. SMITH

AN ONTARIO worker with some managerial responsibility and more than five years of service is entitled to eight months reasonable notice, but didn't do enough to look for new work and will get compensation for only six months, the Ontario Superior Court of Justice has ruled.

La Presse is a daily online French-language newspaper based in Montreal. It hired Merida Lake, 54, in August 2013 to be the general manager of a sales division based in Toronto and she started work one month later. Prior to joining La Presse, Lake had worked for 20 years in sales and sales operations for various media companies, including her previous position as a brand director for a multiplatform media brand. Her position with La Presse involved a more senior job title, higher salary, and higher bonus than her last job. She was the most senior employee in Toronto and reported to the vice-president of

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A course correction on emergency leave and constructive dismissal

Ontario court reverses position on COVID-19-related temporary layoffs and constructive dismissal

BY SHERRARD KUZZ LLP

SIX WEEKS after the Ontario Superior Court ruled that a COVID-19-related temporary layoff deemed to be an Infectious Disease Emergency Leave (IDEL) under provincial legislation could constitute a constructive dismissal under the common law, the same court — but a different judge — ruled the exact opposite. The latter decision, of Justice Jane Ferguson, dismisses the former as "wrong in law" and lacking in "common sense."

This stunning clash of two decisions of the same high-ranking Ontario court will very likely make its way to the Court of Appeal for Ontario, and perhaps even to the Supreme Court of Canada. The stakes are high for all parties concerned and clarity is needed.

A brief overview of the issue

In the early days of the pandemic, many employers were forced to temporarily lay off employees. In response, on May 29, 2020, the Ontario government introduced a regulation under the province's Employment Standards Act, 2000 (ESA) which deemed any employee laid off for a COVID-19-related reason to be on IDEL (the IDEL regulation).

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Earlier decision kept protections under common law and legislation separate

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The IDEL regulation specifically states that a reduction of hours or wages for a COVID-19-related reason between March 1, 2020 and July 3, 2021 (since extended to Sept. 25, 2021) is not a constructive dismissal:

"7. (1) The following does not constitute constructive dismissal if it occurred during the COVID-19 period:

1. A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to the designated infectious disease.
2. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease…."

While the IDEL regulation settled the matter with respect to a constructive dismissal under the ESA, the question remained: Could a layoff or substantial reduction in hours related to COVID-19 still constitute a constructive dismissal at common law? According to first court decision in *Coutinho v. Ocular Health Centre*, the answer was yes.

In *Coutinho*, the employer argued that, given the unprecedented emergency brought on by COVID-19, the IDEL regulation ought to preclude both statutory and common law constructive dismissal claims. That is, a layoff related to COVID-19 should not constitute a constructive dismissal under either the ESA or common law.

The judge rejected this argument, concluding that while the IDEL regulation precluded a claim of constructive dismissal under the ESA, it did not affect an individual's right to pursue a common law claim. Relying on s. 8 of the ESA — which states, "Subject to s. 97, no civil remedy of an employee against his or her employer is affected by this act" — the judge held:

"In my view, the scope of s. 7 deeming a temporary lay-off for reasons related to COVID-19 to not constitute a constructive dismissal is constrained by s. 8(1) of the ESA. It is not possible to reconcile the interpretation of the IDEL Regulation urged by [the employer] with the section of the statute which unequivocally provides that an employee's civil remedy against her/his employee shall not be affected by any provision of the act."

The judge also quoted from a publication of the Ontario Ministry of Labour, Training and Skills Development, which stated: "These rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law."

Same issue – different result

Rejecting the decision in *Coutinho* as "absurd," Justice J.E. Ferguson in *Taylor v. Hanley Hospitality Inc.* ruled that the court could and should take judicial notice of the exceptional nature of COVID-19 and its impact on Canadian business and employment; something the previous decision did not consider.

Justice Ferguson's reasons are summarized as follows:

> The court said that courts should take judicial notice of the exceptional nature of COVID-19 and its impact on Canadian business and employment.

- In response to a global pandemic, the legislature triggered a state of emergency and required employers to cease or curtail their operations.
- Various levels of government have undertaken a variety of evolving emergency measures to attempt to mitigate the effects of the pandemic; those measures included the complete closure of certain businesses and restrictions on how certain businesses can operate.
- Through no choice of their own, some employers have had to temporarily close their businesses or cut back their operations, laying off employees and/or reducing employee hours.
- This exposed employers to for claims of statutory and common law constructive dismissal. To avoid those consequences, the legislature enacted the IDEL regulation, which expressly states that an employee whose hours of work are temporarily reduced or eliminated, or whose wages are temporarily reduced, for reasons related to COVID-19, is not considered to be on a layoff, but on a statutory IDEL leave instead.
- Section 8 of the ESA does not prevent the ESA from displacing the common law; section 8 merely confirms that the ESA does not establish an exclusive forum to seek redress for issues involving the ESA. This was confirmed by the Court of Appeal for Ontario in Elsegood v. Cambridge Spring Service (2001) Ltd. — a dismissal matter under the ESA in which the court stated, "Simply put, statutes enacted by the legislature displace the common law," and it is a "faulty premise that the common law continues to operate independently of the ESA."
- Accordingly, the IDEL regulation can and did change the common law and any argument regarding the common law and layoffs is therefore "inapplicable and irrelevant."

Concluding that "it should be obvious to the world what the legislature's intention was," Justice Ferguson wrote: "The employee cannot be on a leave of absence for ESA purposes and yet terminated by constructive dismissal for common law purposes. That is an absurd result."

Justice Ferguson agreed with the employer's position that "exceptional situations call for exceptional measures" and there was "inherent unfairness in subjecting employers to wrongful dismissal claims as a result of the government imposing a state of emergency." She added that had the government not passed the IDEL regulation, constructive dismissal claims "would only serve to make the economic crises from the pandemic even worse."

Lessons for employers

While this ruling is welcome news for employers, there is no question the courts or legislature must resolve these conflicting decisions.

In the interim, we emphasize that the potential for exposure resulting from a temporary layoff can be reduced if there is a written employment agreement that gives the employer the right to temporarily lay off an employee. Absent an express or implied term in the employment contract, or an employee's consent, there is no right to lay off at common law.

Historically, most employment agreements have not included a layoff provision. However, simply changing employment agreements without legal advice isn't advisable as a unilateral change of this nature may be unenforceable.

For more information, see:

- *Taylor v. Hanley Hospitality Inc*, 2021 ONSC 3135 (Ont. S.C.J.).
- *Coutinho v. Ocular Health Centre*, 2021 ONSC 3076 (Ont. S.C.J.).
- *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 (Ont. C.A.).

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