



Despite the IDEL Regulation, Employees can Bring a Constructive Dismissal Claim at Common Law

May 4, 2021 - Ugo Mackenzie

In a [recent Ontario case](#), the Court held that the [IDEL Regulation](#) does not preclude an employee from bringing a constructive dismissal claim against her employer at common law.

IDEL Regulation

In our [previous article](#), we discussed in detail the origin, additions, extensions, and application of the Infectious Disease Emergency Leave (IDEL). The [Regulation 228/20](#) under the [Employment Standards Act, 2000](#) (ESA) (the “IDEL Regulation”) states that the following does not constitute constructive dismissal:

- A temporary reduction or elimination of an employee’s hours of work by the employer for reasons related to the designated infectious disease.
- A temporary reduction in an employee’s wages by the employer for reasons related to the designated infectious disease.

The IDEL regulation must be read consistently with the *ESA* which also includes section 8(1):

8 (1) ... no civil remedy of an employee against his or her employer is affected by this Act.

Decision

a) Facts of case

The plaintiff was temporarily laid off in May from her employment with Ocular Health Centre Ltd. In July 2020, she accepted employment with another eye clinic at an annual salary greater than her salary at the time she left Ocular.

The plaintiff brought an action against Ocular seeking damages in the sum of \$200,000 for constructive dismissal and punitive or aggravated damages. In



the Statement of Claim, the plaintiff sought all her common law and statutory entitlements.

b) Position of the parties

- **The Defendant's Position**

Ocular took the position that the plaintiff's hours of work were temporarily reduced or eliminated for "reasons related" to COVID-19 and therefore, pursuant to the IDEL Regulation, the temporary elimination of her employment duties and work hours did not constitute a constructive dismissal.

- **The Plaintiff's position**

The plaintiff argued that the IDEL Regulation did not apply because her hours of work were not temporarily reduced or eliminated for "reasons related" to COVID-19 but rather the clinic was closed, and her hours were consequently eliminated due solely to the business dispute among the principals of Ocular.

The plaintiff also argued that the IDEL Regulation did not prevent her from bringing a claim for constructive dismissal under the common law. She relied on section 8(1) of the *ESA* which states that "no civil remedy of an employee against his or her employer is affected by this Act".

c) Findings of the Court

The Court held that COVID-19 layoffs are still constructive dismissal and the IDEL Regulation does not affect the plaintiff's right to pursue a civil claim for constructive dismissal against the defendant at common law. The Court accepted the plaintiff's argument that section 8(1) of the *ESA* meant that the plaintiff was not precluded from bringing a claim for constructive dismissal at common law.

Key Takeaways for Employers

This case is the first decision by an Ontario Court confirming the right of employees to bring constructive dismissal claims arising from reductions in hours during the time that the IDEL Regulation is in effect.



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Interestingly, in this case, the plaintiff fully mitigated her common law damages by accepting employment elsewhere at a higher rate of pay. As a result, her remedy for constructive dismissal in the courts was limited to her statutory entitlements under the *ESA*. Statutory notice and severance are payable regardless of an employee's successful mitigation efforts.

In the decision, the Court referred to the [Ministry of Labour's website regarding the IDEL Regulation](#) and the statement that “[t]hese rules affect only what constitutes a constructive dismissal under the *ESA*. These rules do not address what constitutes a constructive dismissal at common law.” In this case, the plaintiff's only entitlement arose under the statute, and yet the Court found she was entitled to pursue it before the Courts. It will be interesting to see if this aspect of the case is appealed or further considered in other cases.

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