

# COVID-19-RELATED LAYOFFS NOT GROUNDS FOR CONSTRUCTIVE DISMISSAL

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An Ontario Superior Court of Justice judge has ruled that a temporary layoff related to COVID-19 is not grounds for constructive dismissal.

In *Taylor v Hanley Hospitality Inc.* [1], the court held that the *Infectious Disease Emergency Leave* regulation (the “IDEL Regulation”) under the *Employment Standards Act, 2000* (the “Act”) [2] displaces an employee’s constructive dismissal claim at common law, providing a conflicting view from the court’s earlier decision in *Coutinho v Ocular Health Centre Ltd.* [3]

## Background

Infectious disease emergency leave (“IDEL”) was at the forefront of the Ontario Government’s efforts to mitigate the impact of the COVID-19 pandemic on job losses, deeming any employee temporarily laid off due to COVID-19 to be on unpaid and job-protected IDEL. The IDEL Regulation specifically states that an employee on IDEL is exempt from the application of sections 56 (“What constitutes termination”) and 63 (“What constitutes severance”) of the Act.

In *Taylor*, the question before the court was whether the IDEL Regulation affected an employee’s ability to claim constructive dismissal at common law. The employee argued that the IDEL Regulation did not bar her claim due to section 8(1) of the Act, which states that no civil remedy of an employee against his or her employer is affected by the Act. In its defence, the employer argued that the employee – who had been laid off for five months due to the impact of COVID-19 and the emergency orders issued by the Ontario Government – was deemed to be on IDEL for the entirety of her layoff and, therefore, could not claim constructive dismissal.

## The Decision

In a surprising twist, the court accepted the employer’s argument and found that the IDEL Regulation displaced the employee’s ability to assert constructive dismissal under the common law. The court reasoned that the IDEL Regulation should not be given an interpretation that would render it meaningless; that legislation such as the IDEL Regulation can and does displace the common law; and that the legislature

“recognized the inherent unfairness in subjecting employers to wrongful dismissal claims as a result of the government imposing a state of emergency”.

The court also considered the reasoning in *Coutinho*, another Ontario Superior Court of Justice decision that came to the opposite conclusion regarding the IDEL Regulation just a few weeks prior. The court held that *Coutinho* failed to consider a number of key factors and went too far in finding that section 8(1) of the Act prevented the IDEL Regulation from displacing the common law. After reviewing the earlier decision, the court in *Taylor* held that *Coutinho* was wrong in law and should not be followed.

The court concluded by stating that:

All temporary layoffs related to COVID-19 are deemed to be IDELs, retroactive to March 1, 2020 and prospective to the end of the COVID-19 period. As such, the plaintiff’s layoff is no longer a layoff. It is an IDEL and the normal rights for statutory leaves are applicable (e.g. reinstatement rights, benefit continuation). This means any argument regarding the common law on layoffs has become inapplicable and irrelevant.

### **Takeaways for Employer**

The court’s decision in *Taylor* is potentially of great significance to employers who have had to implement temporary layoffs or reductions to employees’ hours and wages in the past 16 months. Based on this decision, it is possible that the IDEL Regulation may serve as a complete defence to constructive dismissal claims arising out of temporary layoffs or hour and wage reductions related to the COVID-19 pandemic.

However, caution should be exercised given the court’s conflicting decision in *Coutinho*, which came to the opposite conclusion. This conflict will likely be resolved by Ontario’s Court of Appeal in the coming months. Until then, however, employers should rely upon the *Taylor* decision to bolster their defences to constructive dismissal claims.

[1][ps2id id='1' target=''] 2021 ONSC 3135.

[2][ps2id id='2' target=''] Infectious Disease Emergency Leave, O. Reg. 228/20.

[3][ps2id id='3' target=''] 2021 ONSC 3076.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are in a dark red color, while the 'm', 'i', 'l', 'l', 'a', and 'n' are in a light blue color. The logo is positioned in the upper left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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