



---

# e2r Alert!

---

## Attention Ontario Employers: Court confirms IDEL a Constructive Dismissal at Common Law

A recent Ontario case (*Coutinho v. Ocular Health Centre Ltd.*) has confirmed what most employment lawyers had suspected - placing an employee on a deemed Infectious Disease Emergency Leave ("IDEL") can constitute a constructive dismissal at common law.

By way of reminder, deemed IDEL is essentially a temporary layoff due to COVID-19 reasons (i.e. when an employer has temporarily reduced or eliminated an employee's hours of work or wages for reasons related to COVID-19). Placing an employee on deemed IDEL is not considered a temporary layoff or a constructive dismissal under the Ontario *Employment Standards Act, 2000*, as amended ("ESA"). However, the question has always been, does placing an employee on a deemed IDEL constitute a constructive dismissal at common law absent a contractual provision permitting employee layoffs?

The facts of this case are relatively simple. On May 29, 2020, the employee was told she was being placed on a temporary layoff due to COVID-19 (i.e. a deemed IDEL). The employee was not provided with an anticipated return to work date. The employee sued her employer alleging that she had been constructively dismissed. The employer took the position that a deemed IDEL was not a layoff or a constructive dismissal at common law because it was permitted under the ESA.

The court disagreed with the employer and held that even though the ESA did not consider a deemed IDEL to be a temporary layoff or constructive dismissal, the legislation did not modify the common law doctrine of constructive dismissal which has consistently held that an employee unilaterally placed on an unpaid layoff or leave, absent a contractual provision permitting the action, can successfully sue for constructive dismissal.

This is a devastating decision for employers who were forced by the pandemic to make difficult decisions to save their businesses. That said, this decision should not impact

e2r<sup>®</sup>

employers who placed employees on a deemed IDEL who had employment agreements with temporary layoff clauses or where the employees consented to the leave/layoff.

Of note, the deemed IDEL currently expires on July 3, 2021. Absent an extension, employees not recalled to work by July 3, 2021 will automatically be considered to be on temporary layoff again. If you have any questions about the status of your employees on leave/layoff, please reach out to speak with an e2r™ Advisor!