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ONTARIO SUPERIOR COURT ADDRESSES COVID-19 TEMPORARY LAYOFF PROVISIONS, BUT UNCERTAINTY REMAINS

By Barry W. Kwasniewski*

A. INTRODUCTION

IT IS "JUST COMMON SENSE" that a law intended to provide relief to employers during a state of emergency should not, as a result, subject them to wrongful dismissal claims, according to the Ontario Superior Court. Such a situation is inherently unfair and "would only serve to make the economic crisis from the pandemic even worse." This reasoning is from *Taylor v Hanley Hospitality* ("*Taylor*"),[1] released June 7, 2021, which ruled on the legal effect of Infectious Disease Emergency Leave ("IDEL") provisions. IDEL was added to the Ontario *Employment Standards Act, 2000* ("*ESA*") by the provincial legislature last year and set by a government regulation in response to the COVID-19 pandemic.[2] Amendments to the ESA introduced in May 2020 provided that all temporary layoffs relating to COVID-19 are deemed to be IDEL, retroactive to March 1, 2020, and continuing until the end of the COVID-19 period, which was recently extended to September 25, 2021. Charities and not-for-profits in Ontario are also impacted by this issue in considering the risks of placing employees on temporary leave for reasons related to COVID-19.

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[1] 2021 ONSC 3135 at para 22 [*Taylor*], online: CanLII https://www.canlii.org/en/on/onsc/doc/2021/2021onsc3135/2021onsc3135.html.

[2] SO 2000, c 41, s 50.1 [*ESA*]; Ontario Regulation 228/20, *Infectious Disease Emergency Leave* [O Reg 228/20]; see Barry W. Kwasniewski & Luis R. Chacin, "New Infectious Disease Emergency Leave Provides Relief to Ontario Employers," *Charity & NFP Law Update: June 2020*, online: Carters.ca <https://www.carters.ca/pub/update/charity/20/jun20.pdf>.

The decision in *Taylor* contradicts an April 27, 2021 judgment from the Ontario Superior Court in *Coutinho v Ocular Health Centre Ltd.* ("*Coutinho*"),[3] leaving the current law in an uncertain state. The court in *Coutinho* held that IDEL, which gives employers the option to place employees on leave for reasons related to COVID-19, does not preclude employees from claiming constructive dismissal under the common law. The court in *Taylor*, on the contrary, ruled that allowing constructive dismissal claims at common law would render IDEL useless; therefore, according to established precedent, the statutory provisions must displace the possibility for employees to claim their common law rights.[4] The disagreement between the two cases also involves the legal interpretation of "constructive dismissal" according to the common law, and its meaning under the *ESA*.[5] This *Charity & NFP Law Bulletin* examines and compares the reasoning in both cases.

B. *TAYLOR v HANLEY HOSPITALITY*

JUSTICE J.E. FERGUSON ("Ferguson J") provided context for the *Taylor* decision by taking judicial notice of the following:

> (a) hundreds of thousands of Canadians had their employment interrupted by the COVID-19 pandemic;
>
> (b) on March 17, 2020, the Ontario Government declared a state of emergency due to an outbreak of COVID-19;
>
> (c) as a result of the declaration, Tim Hortons[6] was required by the Ontario Government to close all of their storefronts and was limited to takeout and delivery;
>
> (d) 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;

[3] 2021 ONSC 3076 [*Coutinho*], online: CanLII https://www.canlii.org/en/on/onsc/doc/2021/2021onsc3076/2021onsc3076.html.
[4] Constructive dismissal, in this general sense, is a common law doctrine that significant, unilateral changes in the conditions of employment, such as a layoff, constitute a termination-without-cause in breach of the employment contract, and grounds for a wrongful dismissal claim, which could lead to expensive payouts in lieu of lengthy reasonable notice periods depending on the judge's determination of what is appropriate in the circumstances.
[5] There is also a "constructive dismissal" under the *ESA* that may be prescribed by regulation; see *Couthinho v Ocular Health,* C.1, *below*.
[6] Hanley Hospitality Inc., the defendant, operating as Tim Hortons, was the plaintiff's employer; see B.1, *below.*

> (e) those emergency measures have had an impact on the employment market. Through no choice of their own, some employers have had to temporarily close their businesses or cut back their operations;
>
> (f) the various levels of government have implemented legislative measures to address both (1) the unprecedented (in modern times, at least) impact of the pandemic; and (2) the impact of the emergency measures on businesses and the employees who work in those businesses;
>
> (g) The province undertook legislative measures to address the employment impacts of the pandemic and the emergency measures implemented to mitigate the effects of the pandemic.[7]

Ferguson J considered the case to be about statutory interpretation of the *ESA*, and held it an appropriate Rule 21 motion as per the *Rules of Civil Procedure*:[8] the determination of an issue before trial, on a question of law.[9]

1. Background

Ms. Candace Taylor was temporarily laid off from her employment with Hanley Hospitality Inc. operating as a Tim Hortons ("Tim Hortons") on March 27, 2020, and returned to work on September 3, 2020.[10] Ms. Taylor claimed that her temporary layoff was a termination, arguing that IDEL "does not displace the common law doctrine that a layoff is a constructive dismissal."[11] Tim Hortons pleaded in its defence that the Ontario government's declaration of emergency due to COVID-19 on March 17, 2020 forced it to close all storefronts and one of their stores entirely. Accordingly, Tim Hortons had to make workforce reductions, similar to many other employers in Ontario, and "was left with no choice but to temporarily lay off over 50 employees," including Ms. Taylor.[12]

2. Analysis

Ferguson J cites the IDEL regulation under the *ESA*, which explicitly provides that the following "does not constitute constructive dismissal if it occurred during the COVID-19 period":[13]

[7] *Taylor*, *supra* note 1 at para 4.
[8] RRO 1990, Reg 194, s 21.01(1).
[9] *Taylor*, *supra* note 1 at para 3.
[10] *Ibid* at paras 5–7.
[11] *Ibid* at para 12.
[12] *Ibid* at para 9.
[13] O Reg 228/20 s 7(1). The "COVID-19 Period" is a period of time set in the regulation, which may be extended by amendment.

> 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.

Reviewing all of the relevant provisions in the regulation and the *ESA*, Ferguson J determined that there are three groups of reasons an employee might be placed on IDEL, depending on whether the decision for taking leave is in the hands of the government, the employee, or the employer.[14] In any case:

> All temporary layoffs relating 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.[15]

Ferguson J. dismissed Ms. Taylor's action, leaving submissions with respect to costs to follow.[16]

C. *COUTINHO v OCULAR HEALTH CENTRE*

THE *COUTINHO* DECISION was on a motion for summary judgment by the defendant employer, Ocular Health Centre Ltd. ("Ocular") to dismiss the action, arguing that they were not liable for constructive dismissal because of the IDEL regulation.[17] Justice D.A. Broad ("Broad J") disagreed and found in favour of the plaintiff on the issue of her right to claim constructive dismissal.

1. Background

Ms. Jessica Coutinho commenced her employment at Ocular as an ophthalmic technician in October 2014, and was promoted to an office manager in October 2018.[18] After a dispute arose in April 2020 between Ocular and some ophthalmologists at the clinic concerning COVID-19 guideline compliance, Ms. Coutinho received a telephone call from Ocular informing her that the clinic was

[14] *Taylor*, *supra* note 1 at para 18.
[15] *Ibid* at para 19.
[16] *Ibid* at paras 22–23.
[17] *Coutinho*, *supra* note 3 at paras 1, 35.
[18] *Ibid* at para 4.

closed, but that she would "be paid until further notice."[19] Then on May 29, 2020, Ms. Coutinho received a written letter from Ocular stating that she would be placed on temporary layoff, and that Ocular would do its best to recall her to her position as soon as possible.[20] Ms. Coutinho was eventually re-employed by the other ophthalmologists at a new clinic on July 22, 2020. However, she issued a claim on June 1, 2020 against Ocular seeking damages of $200,000 for constructive dismissal, as well as punitive or aggravated damages, with "all of her common law and statutory entitlements."[21] She took the position that "the IDEL Regulation does not affect her common law right to pursue a civil claim against Ocular for constructive dismissal."[22]

In its defence Ocular alleged that it could not continue to employ all of the employees at the clinic after it was closed "due to the COVID-19 health crisis" and that was why Ms. Coutinho was temporarily laid off. Ocular pleaded that Ms. Coutinho was deemed to be on IDEL under the *ESA* and O Reg 228/20, and therefore the "temporary elimination of her employment duties and work hours did not constitute constructive dismissal."[23] If Ms. Coutinho was deemed on IDEL, then there would be no cause of action against Ocular.

2. Analysis

Broad J found that the IDEL Regulation "does not affect Coutinho's right to pursue a civil claim for constructive dismissal against Ocular at common law."[24] Prior to this case, the court was "unable to find any reported case interpreting or considering the IDEL Regulation."[25] Broad J began his analysis by citing section 8(1) of the *ESA*:

> Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

[19] *Ibid* at paras 7–10.
[20] *Ibid* at para 12.
[21] *Ibid* at paras 13–14.
[22] *Ibid* at para 34.
[23] *Ibid* at paras 15–16.
[24] *Ibid* at para 36.
[25] *Ibid* at para 37.

Section 97 only applies to block a civil proceeding if a complaint about the same "termination or severance of employment" is filed under the *ESA*, but there was no evidence that Ms. Coutinho had done so.[26]

Citing case law precedent for statutory interpretation, Broad J found that the scope of IDEL is "constrained by s. 8(1) of the ESA. It is not possible to reconcile the interpretation of the IDEL Regulation urged by Ocular with the section of the statute which unequivocally provides that an employee's civil remedy against his/her employee shall not be affected by any provision of the Act."[27] Broad J found further support for his reasoning in extrinsic evidence, namely the online publication of the Ontario Ministry of Labour, Training and Skills Development's *Your Guide to the Employment Standards Act: temporary changes to ESA rules* (the "Ministry Guide").[28] The Ministry Guide explicitly states that the IDEL regulation "establishes that there is no constructive dismissal under the ESA" and that IDEL rules affect "only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law."[29] Broad J cited *Elsegood v Cambridge Spring Service 2001 Ltd.*:[30] "at common law, an employer has no right to lay off an employee and that absent an agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and would be a constructive dismissal."[31] Therefore Ms. Coutinho retained her right to claim constructive dismissal. As there were other genuine issues to be determined, Broad J. ordered the case to proceed to trial.

D. COMPARISON

IN HER REASONING for *Taylor*, Ferguson J considered the *Coutinho* case, and considered it an erroneous decision on the issue of constructive dismissal. "It offends the rules of statutory interpretation to give an interpretation that renders legislation meaningless," Ferguson J noted; and "what does IDEL and the Regulation mean if not what Tim Hortons says it means?"[32] Regarding section 8(1) of the *ESA*, Ferguson

[26] *Ibid* at paras 38–39.
[27] *Ibid* at para 43.
[28] *Ibid* at para 44; "COVID-19: temporary changes to ESA rules," online: Ontario Ministry of Labour, Training and Skills Development <https://www.ontario.ca/document/your-guide-employment-standards-act-0/covid-19-temporary-changes-esa-rules>.
[29] *Coutinho, supra* note 3 at para 46.
[30] 2011 ONCA 831, online: CanLII < https://www.canlii.org/en/on/onca/doc/2011/2011onca831/2011onca831.html>.
[31] *Coutinho, supra* note 3 at para 50.
[32] *Taylor, supra* note 1 at para 21.

J also cited the Court of Appeal's decision in *Elsegood v Cambridge Spring Service (2001) Ltd.*[33] , which considered that section, finding that "statutes enacted by the legislature displace the common law" and that it is a "faulty premise that the common law continues to operate independently of the *ESA*".[34] According to Ferguson J, therefore, the reasoning is clear:

> (a) The employee was on a leave of absence (IDEL) for all purposes;
>
> (b) The employee was deemed not to be laid off for all purposes;
>
> (c) The employee was not constructively dismissed for all purposes;
>
> (d) 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. That is the same kind of "untenable" result that the employer was seeking in *Elsegood*.

Recognizing the "conflicting decisions on the law" as a result contradicting *Coutinho*, Ferguson J stated "the court should not follow *Coutinho* if the court is of the view that it was wrongly decided" and "the law would be better served by a decision that applies common sense and the rules of interpretation" that an employee is not constructively dismissed by virtue of the IDEL provisions, the intention of which "should be obvious to the world".[35]

E. CONCLUSION

WHILE THE RECENT *Coutinho* decision favoured employees by allowing a claim for constructive dismissal to proceed, the even-more-recent *Taylor* decision favours employers by dismissing a similar action, both with regard to deemed IDEL of an employee. *Coutinho* distinguishes between the meaning of constructive dismissal in the common law, and its meaning under the *ESA*, ruling that the statute itself states that it does not displace the common law civil action, using extrinsic evidence from a publication of the Ontario government. On the other hand, *Taylor* held that constructive dismissal was explicitly displaced as a claim under the common law by the IDEL regulation under the *ESA*, including its statutory meaning, applying what the court described as a common sense approach to statutory interpretation.

[33] *Elsegood, supra* note 28.
[34] *Taylor, supra* note 1 at para 21.
[35] *Ibid.*

Since both judgments are from the Ontario Superior Court, any binding resolution of the disagreement would need the involvement of a higher court, namely, the Ontario Court of Appeal. Until that happens, we are left in an uncertain state of employment law on this issue, which is left to the discretion of Superior Court judges to weigh the persuasive precedent on either side. As it stands, employers of charities and not-for-profits must be prepared to face the risk of constructive dismissal claims if placing employees on IDEL.

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