Does a COVID Leave Trigger Constructive Dismissal? Third Case Further Muddies the Waters

By Jeremy Schwartz and Haadi Malik

A couple of weeks ago, we wrote on the decision in *Taylor v Hanley Hospitality Inc*. ("***Taylor***") in which a judge in the Superior Court found that Ontario's Infectious Disease Emergency Leave ("**IDEL**") did not trigger a constructive dismissal at common law, and that the earlier decision of another judge finding that it did, *Coutinho v Ocular Health Care Ltd*. ("***Coutinho***"), was wrongly decided.

Normally, an employer must have a contractual right to layoff an employee (which is permissible up to certain time limits defined in the *Employment Standards Act*, 2000 ("**ESA**")), otherwise the layoff is deemed a termination and the employee can sue the employer for constructive dismissal. In 2020, the Ontario government introduced a new regulation under the ESA which stated that any layoff resulting because of the COVID-19 pandemic was instead deemed an IDEL.

The Court in *Coutinho,* on a narrow and technical reading of the ESA, found the IDEL regulation did not extinguish an employee's right to sue at common law for constructive dismissal. The Court in *Taylor* rejected this conclusion, viewed the IDEL contextually and found that its purpose was to protect employers who were forced to curtail business operations because of the pandemic from constructive dismissal lawsuits.

We flagged that this inconsistency in the caselaw would likely be up to the Court of Appeal to resolve. Barely two weeks after *Taylor*, another Court released the decision in *Fogelman v. IFG*, (*as yet unreported*, 2021 ONSC 4042) ("***Fogelman***"), which supports the finding in *Coutinho* that an employee on deemed IDEL can still sue for constructive dismissal at common law. *Fogelman* was released overlapping with *Taylor*, so neither judge had the benefit of the other's decision.

Facts of *Fogelman*

The Employee in *Fogelman* was hired in 2009 by International Finance Group ("**IFG**") and temporarily laid off because of reasons related to COVID-19 in March 2020. Importantly, he did not wait for months to pass, but objected to the layoff soon after.

As a part of its defence, IFG claimed that the IDEL regulation disentitled the Employee from suing for constructive dismissal. The Court in *Fogelman* adopted the position in *Coutinho* that the ESA, under which the IDEL regulation was made, does not affect an employee's civil rights (i.e. right to sue in court), and thus the IDEL regulation only disentitles a constructive dismissal claim for the purposes of the ESA (i.e. a claim made with the Ministry of Labour, which is an alternate remedial avenue employees may seek). This interpretation effectively meant that the IDEL regulation provided no significant protection

for employers as awards for claims under the ESA are generally significantly lower than what a court could provide to a dismissed employee under the common law.

IFG argued that the Employee's employment contract contained a termination clause which limited his severance entitlement to the minimums under the ESA. The Court found that this provision was unenforceable, because IFG had provided no fresh consideration (i.e. an exchange of value such as a one-time payment, which is required under the law to make a contract binding).

Punitive Damages

In addition to awarding a substantial common law notice award, the Court also awarded him $25,000 in punitive damages, for the following reasons:

- Upon being notified of the Employee's constructive dismissal claim, IFG did not pay out his minimum entitlements under the ESA to termination pay, and ignored his lawyer's letter requesting these payments;
- IFG did not recall the Employee or tell him about his prospects of being recalled despite promising to do so when he was laid off. IFG argued that his claim of dismissal was an excuse for not communicating on these points; and
- IFG made it difficult to affect service of the Statement of Claim (its lawyer declined to accept service and then IFG's workers stated that they were instructed not to accept service so as "to make it as difficult as possible").

What does this mean for employers?

Like two ships passing in the night, *Taylor* and *Fogelman* were decided in isolation from the other. It is increasingly clear that this state of uncertainty will continue until the Court of Appeal weighs in – hopefully very soon.

IDEL is set to expire on September 25, 2021, unless the Government extends it again. As the province reopens, it will be more and more difficult to prove that continued layoffs are ongoing as a result of COVID-19. In the meantime, and certainly until the Court of Appeal weighs in on the *Taylor / Fogelman* controversy, negotiations and litigation with employees in the context of IDEL and/or COVID-related layoffs and recalls must be approached carefully, always in good faith, and best with the benefit of legal advice.

For more information, **please contact:**
Jeremy D. Schwartz at jschwartz@stringerllp.com or 416-862-7011
Haadi Malik at hmalik@stringerllp.com or 416-849-2552

UPDATE is an electronic publication of Stringer LLP
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com