CITATION: Taylor v. Hanley Hospitality Inc., 2021 ONSC 3135
COURT FILE NO.: CV-20-643372
DATE: 20210607

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Candace Taylor, Plaintiff

AND:

Hanley Hospitality Inc. o/a Tim Hortons, Defendant

BEFORE: J.E. Ferguson J.

COUNSEL: *Lluc Cerdà*, for the Plaintiff

Ian A. Johncox and Stephanie A. Miner, for the Defendant

HEARD: April 21, 2021

ENDORSEMENT

[1] This is a Rule 21 motion brought by Hanley Hospitality Inc. operating as Tim Hortons ("Tim Hortons").

[2] Candace Taylor ("Ms. Taylor") opposes the motion and takes the position that it is not an appropriate Rule 21.01(1) motion.

[3] This is entirely an appropriate Rule 21.01(1) as it involves statutory interpretation (and no matters of credibility).

[4] I agree with Tim Hortons, that the court can take 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 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;

(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.

[5] On March 27, 2020, Ms. Taylor was temporarily laid off from her employment. She did not resign.

[6] On August 18, 2020, Ms. Taylor was advised in writing that she was being recalled to her employment, effective September 3, 2020.

[7] Ms. Taylor returned to her employment with Tim Hortons and continues to be employed by it.

[8] Ms. Taylor pleads that the layoff "was a business decision made by the company in response to unfavourable economic conditions".

[9] Tim Hortons pleads in its statement of defence:

6. On March 17, 2020, the Ontario Government declared a state of emergency due to an outbreak of the coronavirus disease ("COVID-19").

7. As a result of the declaration, Hanley Hospitality was required by the Ontario Government to close all of their Tim Hortons storefronts and one of their stores entirely.

8. Like many employers in Ontario, Hanley Hospitality had to make reductions to their workforce because the state of emergency limited the manner in which they could do business.

9. Hanley Hospitality was left with no choice but to temporarily lay off over 50 employees, including the plaintiff.

[10] Ms. Taylor did not deliver a reply. The rules require that a party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version.

[11] I agree that by virtue of Rule 25 and Ms. Taylor not delivering a reply, Ms. Taylor has acknowledged that she does not intend to prove that the layoff was for reasons other than related to COVID-19. This legal conclusion is also a common sense conclusion.

[12] Ms. Taylor claims that her temporary layoff is a constructive dismissal and that her employment has been terminated. Essentially her argument is that the Employment Standards Act, 2000, SO 2000, c.41 (the "ESA") and Ontario Regulation 228/20, does not displace the common law doctrine that a layoff is a constructive dismissal. I do not agree in these times of COVID-19.

The Employment Standards Act, section 50.1(1.1)

[13] The ESA contains provisions for emergency leave for declared emergencies and infectious disease emergencies. Specifically:

> Leave of absence without pay,
>
> (1.1) An employee is entitled to a leave of absence without pay if the employee will not be performing the duties of his or her position,
>
> (a) because of an emergency declared under section 7.0.1 of the Emergency Management and Civil Protection Act and,
>
> (i) because of an order that applies to him or her made under section 7.0.2 of the Emergency Management and Civil Protection Act;
>
> (ii) because of an order that applies to him or her made under the Health Protection and Promotion Act;
>
> (iii) because he or she is needed to provide care or assistance to an individual referred to in subsection (8); or
>
> (iv) because of such other reasons as may be prescribed; or
>
> (b) because of one or more of the following reasons related to a designated infectious disease:
>
> …
>
> (ii) the employee is acting in accordance with an order under section 22 or 35 of the Health Protection and Promotion Act that relates to the designated infectious disease;
>
> …
>
> (vii) such other reasons as may be prescribed.

[14] COVID-19 has been prescribed as a "designated infectious disease" under the ESA.

Ontario Regulation 228/20

[15] The Regulation prescribed the following additional reasons under section 50.1(1.1)(b)(vii) of the Act:

> (a) an order made under section 7.0.2 of the Emergency Management and Civil Protection Act that is continued under the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, or any amendment to such an order, that relates to the designated infectious disease applies to the employee;[1]
>
> (b) The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease.[2]

[16] The Regulation provides that:

> (a) COVID-19 is an "infectious disease" for the purposes of section 50.1 of the Act during the COVID-19 period;
>
> (b) entitlement to the emergency leave because of the reason in s. 4(1)1. of the Regulation is deemed to have started on March 1, 2020 and applies during the COVID-19 period;
>
> (c) an employee who does not perform the duties of his or her position because of the reason set out in section 4(1)1 of the Regulation is deemed to be on an infectious disease emergency leave under section 50.1 of the Act in respect of any time during the COVID-19 period that the employee does not perform such duties because of that reason;
>
> (d) an employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period is exempt from the application of sections 56 and 63 of the Act for the purposes of determining whether the employee has been laid off, and the employee shall not be considered to be laid off under those sections, other than under clause 63 (1) (d) of the Act.

[17] The Regulation further provides that a temporary reduction or elimination of an employee's hours of work by the employer for reasons related to COVID-19 during the COVID-19 period does not constitute constructive dismissal:

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[1] Section 3(1) of the Regulation.
[2] Section 4(1) of the Regulation.

> 7. (1) The following does not constitute constructive dismissal if it occurred during the COVID-19 period:
>
> 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.

[18] When one reviews the reasons for being placed on Infectious Disease Emergency Leave ("IDEL"), one can see that various parties have the authority to decide if the employee will be placed on IDEL:

(i) in some cases, the decision is in the hands of government (e.g., an order made under the Emergency Management and Civil Protection Act);

(ii) in some cases, the decision is in the hands of the employee (e.g., the employee is providing care to a designated individual);

(iii) in some cases, the decision is in the hands of the employer (e.g., the employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease).

[19] 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.

[20] After hearing the motion, I was provided with additional submissions as a result of the release of *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 ("*Coutinho"*).[3]

[21] I agree with the defendant's submissions regarding this case:

(i) no matter which authority one wants to consider on the point - it offends the rules of statutory interpretation to give an interpretation that renders legislation meaningless. That issue was never addressed in *Coutinho*;

(ii) *Coutinho* never addressed the consequential analysis - what does IDEL and the Regulation actually mean if not what Tim Hortons says it means?;

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[3] *Coutinho v. Ocular Health Centre Ltd*., 2021 ONSC 3076.

(iii) what we see from the cases is that s. 8(1) simply sets out that the ESA does not set out an exclusive forum for addressing matters set out in the Act. The employee can make a complaint under the Act or seek redress in the courts;

(iv) the courts have never said that the Act does not or cannot displace the common law. In fact, they have said the opposite. The Court of Appeal addressed this in *Elsegood*[4] (relied upon by the plaintiff in this case):

(a) the irony is that *Elsegood* was a constructive dismissal case;

(b) the court put it succinctly: "Simply put, statutes enacted by the legislature displace the common law";

(c) in *Elsegood*, the court addressed the fact that s. 56 provides that a person was terminated "for the purposes of section 54" of the ESA. The employer was arguing that the employee was not terminated at common law. The court disagreed. The court found that *"A s. 56(1) termination is a termination for all purposes"*. The court stated that it is a "*faulty premise that the common law continues to operate independently of the ESA*".

(v) if we paraphrase and apply that reasoning to this case, we get this:

(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.*

(vi) in summary, s. 8(1) has never been interpreted to go as far as the court went *in Coutinho* and the courts have never before held that s. 8(1) prevents the ESA from displacing the common law. The Court of Appeal, which is binding on this court and the court in *Coutinho*, has said the opposite, in a constructive dismissal case;

(vii) S. 8(1) of the Act merely confirms that the ESA is not the exclusive forum to seek redress for issues involving the Act;

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[4] *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 (CanLII).

(viii) S. 8(1) does not prevent the Act from displacing the common law. The Court of Appeal has held that statutes displace the common law, in a case dealing with the ESA;

(ix) one should not forget that the common law evolves as the changing times make it necessary to do so;

(x) IDEL is a creature of the Act. The right of the employer to place an employee on IDEL arises from the Act;

(xi) the Regulation gave s. 50.1 retroactive effect by deeming layoffs or reductions in hours prior to May 29, 2020 to be IDEL;

(xii) the Regulation can and did change the common law. Effectively, "in these circumstances (COVID), you are not laid off, not constructively dismissed, and you are on statutory leave of absence";

(xiii) it is essential that the court remember the context of IDEL and the Regulation:

(a) the legislature created the "problem" when it triggered the state of emergency and required employers to cease or curtail their operations.

(b) the legislature forced employers to lay off employees or reduce their hours;

(c) in doing so, the legislature exposed the employers to claims of common law constructive dismissal;

(d) to avoid those consequences, the legislature amended the ESA to create IDEL and created the Regulation;

(e) the legislature solved the very problem that it had created and took away that exposure that arose from its own action;.

(f) it should be obvious to the world what the legislature's intention was by doing so.

(xiv) the court in *Coutinho* failed to consider and appreciate those factors. It is submitted, with respect, that the analysis in *Coutinho* is wrong in law. This court is not bound by it;

(xv) even though we would be in a situation where there are conflicting decisions on the law, the court should not follow *Coutinho* if the court is of the view that it was wrongly decided;

(xvi) the law would be better served by a decision that applies common sense and the rules of interpretation to reach the conclusion sought by the defendant: that the

plaintiff was not constructively dismissed and that she was on IDEL, by virtue of s. 50.1 and the Regulation;

(xvii) there has been no constructive dismissal by Tim Hortons. Ms. Taylor was placed on IDEL by her employer.

[22] I agree with Tim Hortons that exceptional situations call for exceptional measures. The Ontario Government recognized the inherent unfairness in subjecting employers to wrongful dismissal claims as a result of the government imposing a state of emergency. If they did not take action, these claims would only serve to make the economic crisis from the pandemic even worse. It is just common sense. The plaintiff's action is dismissed.

[23] I am prepared to receive brief submissions with respect to costs. They can be sent to my assistant by email at lorie.waltenbury@ontario.ca within 14 days (June 21, 2021) by the defendant and 7 days thereafter (June 28, 2021) by the plaintiff.

J. E. Ferguson J.

Date: June 7, 2021