CITATION: Coutinho v. Ocular Health Centre Ltd., 2021 ONSC 3076
COURT FILE NO.: CV-20-758
DATE: 20210427

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jessica Coutinho, Plaintiff

AND:

Ocular Health Centre Ltd., Defendant

BEFORE: Justice D.A. Broad

COUNSEL: Robert A. Konduros, for the Plaintiff

Catherine E. Allen, for the Defendant

HEARD: April 16, 2021

ENDORSEMENT

[1] This Endorsement is in respect of the defendant's motion for summary judgment seeking dismissal of the action.

Background

[2] At the time of the events in issue the defendant ("Ocular") operated ophthalmic clinics including a clinic in Kitchener, Ontario and a clinic in Cambridge, Ontario.

[3] The principals of Ocular are Dr. Richard Weinstein ("Weinstein") and Mark Reinstra ("Reinstra").

[4] The plaintiff ("Coutinho") was employed by Ocular at the Cambridge clinic earning $52,900 per year. She commenced her employment with Ocular in 2014 as an ophthalmic technician. She was promoted to an office manager in October 2018.

[5] Three ophthalmologists practised at the Cambridge clinic Dr. Nimesh Desai ("Desai"), Dr. Manreet Alangh ("Alangh") and Dr. John Wilkinson ("Wilkinson") (collectively the "Cambridge Doctors").

[6] In April 2020 Weinstein and Reinstra on the one side and Desai and Alangh on the other were embroiled in a dispute over various corporate and business issues. The dispute had been ongoing for some months. It is not clear from the motion material whether Wilkinson was involved in the dispute.

[7] On April 28, 2020 Ocular's lawyer wrote to Desai's lawyer and to Alangh personally alleging that they had failed to comply with COVID-19 physical distancing guidelines in relation to their practices at the Cambridge clinic and requiring them to take immediate steps to comply with the physical distancing guidelines failing which they would not be permitted to practice at the Cambridge clinic. The letters also alleged that Desai and Alangh were in default of certain financial obligations to Ocular and demanded payment by them of the claimed obligations no later than noon on Thursday, April 30, 2020 failing which Weinstein "will take all necessary steps to enforce his rights."

[8] By letter dated April 30, 2020 the lawyer for Desai and Alangh responded, asserting that the allegations in respect of purported breaches of COVID-19 physical distancing guidelines were "completely baseless" and denying that that there were any monies owing by Desai and Alangh to Ocular.

[9] Reinstra attended at the Cambridge clinic after hours on April 30, 2020 and changed the locks to the premises.

[10] Coutinho attended for work at 8:30 a.m. on May 1, 2020 and was met by Reinstra and two of the Cambridge Doctors. Reinstra advised each of them that they would not be allowed entry. Coutinho returned to her home and on arrival received a telephone call from Reinstra who stated:

> "Hi Jessie, it's Mark. I am going to read this off so you know this isn't really me telling you this. As you are aware the Cambridge office is closed. Don't worry about pay. You will be paid until further notice. If you have any questions you are to contact [two named employees] at the Kitchener office. I will follow up with you the following week to discuss things. If you discuss this conversation with the doctors you work for, that will be cause for termination."

[11] Reinstra did not contact Coutinho during the following week notwithstanding his advice to her that he would do so.

[12] On May 29, 2020 Reinstra wrote to Coutinho on Ocular letterhead advising of the following:

- Ocular was recently forced to close the Cambridge clinic and as part of that process found it necessary to temporarily reduce its workforce;
- effective May 29, 2020 Coutinho was being placed on temporary layoff and a Record of Employment will be issued as soon as possible and will include her pay up to and including the effective date of the layoff;
- a link was provided with information regarding unemployment benefits;
- Coutinho was directed to ensure that she advise Ocular of any change in her contact information so that she may be contacted in the event of a recall and she was also directed to advise Human Resources if she secures alternate employment;
- Ocular will do its best to recall Coutinho to her position as soon as possible

[13] Coutinho became re-employed with the Cambridge Doctors at their new clinic "Tri-City Eye" by no later than July 22, 2020 at an annual salary greater than her salary at the time she left Ocular.

Pleadings

[14] By Statement of Claim issued June 1, 2020 Coutinho brought action against Ocular seeking damages in the sum of $200,000 for constructive dismissal and for punitive or aggravated damages. In the Statement of Claim, Coutinho sought all of her common law and statutory entitlements.

[15] In its Statement of Defence dated June 26, 2020, Ocular alleged that it intended to consolidate some of the Cambridge clinic practice into the Kitchener clinic and offered to continue the employment of employees who had worked from the Cambridge clinic to the

Kitchener clinic, but due to the COVID-19 health crisis it could not continue to employ all of the employees who had been working at the Cambridge clinic after it was closed. For that reason, Ocular advised Coutinho that she was being temporarily laid off.

[16] Ocular pleaded that, pursuant to O. Reg 228/20: *Infectious Disease Emergency Leave* under the *Employment Standards Act, 2000,* S.O. 2000, c.41, Coutinho was deemed to be on emergency leave and the temporary elimination of her employment duties and work hours did not constitute a constructive dismissal.

[17] Ocular pleaded further that Coutinho unilaterally terminated her employment and was deemed to have resigned.

[18] Ocular pleaded further, or in the alternative, that if Coutinho was constructively dismissed on May 29, 2020 Ocular had just cause to terminate her employment.

[19] Ocular pleaded that when Coutinho was asked on May 1, 2020 to provide employment hours for all hourly employees working at the Cambridge clinic for the prior two weeks she submitted falsified information respecting the hours and had done so at the request of one of the Cambridge Doctors.

[20] Furthermore, Ocular pleaded that Coutinho, in breach of her duties to it, had disclosed confidential and proprietary information to others, including the Cambridge Doctors. Ocular pleaded that Coutinho, while employed by it, was employed directly by the Cambridge Doctors, thereby breaching her employment contract and duties owed to Ocular.

[21] In her Reply Coutinho denied that nothing in the *Employment Standards Act* or any regulation thereunder derogates from her rights at common law.

[22] Coutinho also pleaded that she advised Reinstra that, prior to providing staff hours for the previous two weeks in the Cambridge clinic, she had been told by Desai and Alangh to send in the total hours because they and Ocular had applied for the employees' subsidy and the employees had been paid their full salaries. She plead that at no time prior to the service

of the Statement of Defence did Ocular allege that she had falsified hours or records or engaged in any fraudulent conduct.

Defendant's Motion for Summary Judgment

[23] By Amended Notice of Motion dated January 29, 2020 Ocular moved for summary judgment on the grounds that:

(a) pursuant to O. Reg 228/20: *Infectious Disease Emergency Leave* under the *Employment Standards Act* Coutinho was deemed to be on emergency leave and the temporary elimination of her employment duties and work hours did not constitute constructive dismissal;

(b) as Coutinho's was not constructively dismissed as she was deemed to be on infectious disease emergency leave, she has no cause of action against Ocular;

(c) furthermore, or in the alternative, Coutinho has fully mitigated any damages that she may have incurred through her prompt re-employment.

Principles Governing Motions for Summary Judgment

[24] The principles governing motions for summary judgment are well known.

[25] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. This will be the case where the summary judgment motion process provides the court with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportional procedure.

[26] If the court finds that there are genuine issues requiring a trial and the record on the motion is insufficient to permit the determination of the genuine issues requiring a trial, it must consider whether the issues can be decided using the fact-finding resources available under subrules 20.04(2.1) and (2.2).

[27] The party responding to a motion for summary judgment is required to put its "best foot forward" and the court is entitled to assume that the evidence led on the motion for summary judgment will be the evidence at trial.

Defence based on O. Reg. 228/20 *Infectious Disease Emergency Leave*

(a) O. Reg 228/20

[28] On May 29, 2020 the Ontario Government made O. Reg. 228/20 *Infectious Disease Emergency Leave* (the "IDEL Regulation"). The rules in the IDEL Regulation were stated to apply during the "COVID-19 period" which was initially from March 1 to July 3, 2020

[29] The pertinent provisions of the IDEL Regulation which were in effect on May 29, 2020 are as follows:

> 4. (1) For the purposes of subclause 50.1 (1.1) (b) (vii) of the Act, the following reason is prescribed:
>
> > 1. The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease.
>
> (2) An employee who does not perform the duties of his or her position because of the reason set out in paragraph 1 of subsection (1) is deemed to be on 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.
>
> 6. (1) 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.

(2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56 (1) (c) of the Act or severed under clause 63 (1) (c) of the Act before May 29, 2020.

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.

(2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56 (1) (b) of the Act or severed under clause 63 (1) (b) of the Act before May 29, 2020.

[30] In summary, the IDEL Regulation provided for five conditions to be satisfied for the rules under the Regulation to apply, as follows:

1. The employee is not represented by a trade union;
2. The employee is subject to a temporary reduction or elimination in hours of work and/or wages;
3. It must be the employer that temporarily reduces or eliminates the employees' hours of work and/or wages;
4. The temporary reduction of elimination of the employees' hours of work and/or wages must have occurred for reasons related to COVID-19;
5. The above four conditions must occur during the defined COVID-19 period,

(b) Positions of the parties

[31] Ocular takes the position that Coutinho's hours of work were temporarily reduced or eliminated for "reasons related" to COVID-19 and she was therefore deemed to be on infectious disease emergency leave. It says that it closed the Cambridge clinic due to legitimate concerns on its part that the Cambridge Doctors were not complying with physical distancing guidelines, which in turn resulted in the elimination of Coutinho's hours of work. As was the case with the other office manager at Cambridge, Ocular was unable to schedule Coutinho to work at the Kitchener clinic as there were already two office managers employed there.

[32] Ocular takes the further position that, pursuant to 7(1) of the IDEL Regulation, the temporary reduction or elimination of Coutinho's hours of work did not constitute a constructive dismissal and therefore she has no cause of action against it for constructive dismissal.

[33] Coutinho takes the position that her hours of work were not temporarily reduced or eliminated for "reasons related" to COVID-19 but rather the Cambridge clinic was closed by Ocular and her hours consequently eliminated due solely to the business dispute between the Weinstein, Reinstra and Ocular and the Cambridge Doctors.

[34] Moreover, Coutinho takes the position that the IDEL Regulation does not affect her common law right to pursue a civil claim against Ocular for constructive dismissal.

(c) Analysis

[35] It is not necessary for me to determine whether Coutinho's hours of work were eliminated for "reasons related" to COVID-19 as I find that there is no genuine issue requiring a trial with respect to Ocular's defence that it is relieved of liability to Coutinho for constructive dismissal by the IDEL Regulation.

[36] I find, for the reasons that follow, that the IDEL Regulation does not affect Coutinho's right to pursue a civil claim for constructive dismissal against Ocular at common law.

[37] Counsel advised that they have been unable to find any reported case interpreting or considering the IDEL Regulation. I likewise have been unable to find any such reported case in my research.

[38] The starting point for the analysis is section 8(1) of the *Employment Standards Act, 2000* (the ESA") which provides as follows:

> 8 (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

[39] Section 97 of the ESA has no application to the circumstances of the case at bar. Subsection (2) provides that an employee who files a complaint under the ESA alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

[40] There is no evidence that Coutinho filed a complaint against Ocular under the ESA alleging an entitlement to termination or severance pay.

[41] Ms. Allen for Ocular argues that, given the unprecedented emergency brought on by the global COVID-19 pandemic and the severity of its impact on employers and employees in Ontario, section 7 of the IDEL Regulation, which deems a temporary layoff by an employer for reasons related to COVID-19 not to constitute a constructive dismissal, ought to be interpreted to apply to not only constructive dismissals for the purposes of the ESA, but also at common law.

[42] In the case of *Bristol-Myers Squibb v. Canada (Attorney-General*, 2005 SCC 26 (S.C.C.) Binnie, J., writing for the majority, citing Dreidger, *Construction of Statutes* (2nd ed. 1983) observed at para. 38 that

> …in the case of regulations, attention must be paid to the terms of the enabling statute:
>
> > It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the

> words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation. (Elmer A. Dreidger, *Construction of Statutes* (2nd ed.1983), at p. 247)

This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision.

[43] In my view, the scope of s. 7 deeming a temporary lay-off for reasons related to COVID-19 to not constitute a constructive dismissal 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 her/his employee shall not be affected by any provision of the Act.

[44] The fact that s. 7 of the IDEL Regulation may not be interpreted so as to take away an employee's right of action at common law against her/his employer for constructive dismissal is reinforced by the online publication of the Ontario Ministry of Labour, Training and Skills Development (the "Ministry"), cited by Ocular in its Factum, entitled *"Your Guide to the Employment Standards Act: temporary changes to ESA rules"* https://www.ontario.ca/document/your-guide-employment-standards-act-0/covid-19-temporary-changes-esa-rules (the "Ministry Guide").

[45] In the section entitled "Overview" at page 1 the Ministry Guide states that on May 29, 2020 the government made a regulation under the ESA in response to COVID-19. During the COVID-19 period, a non-unionized employee is "deemed" on a job-protected infectious disease emergency leave if their employer has temporarily reduced or eliminated their hours of work because of COVID-19.

[46] Under the heading "Constructive dismissal" on page 4 the Ministry Guide stated as follows:

> O. Reg. 228/20 establishes that there is no constructive dismissal under the ESA where a non-unionized employee's wages or hours of work are temporarily reduced or temporarily eliminated by their employer for reasons related to COVID-19 from March

> 1, 2020 to July 3, 2021. This rule does not apply where the termination or severance resulted from a constructive dismissal that occurred before May 29, 2020. For a termination or severance resulting from a constructive dismissal to occur before May 29, 2020, it means the employee must have been constructively dismissed and quit their employment within a reasonable timeframe, all prior to May 29, 2020.
>
> For a discussion of each of the conditions that must be met in order for this rule to apply, please see Conditions for O. Reg. 228/20 temporary layoff and constructive dismissal rules to apply.
>
> These rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law.
>
> (underlining added)

[47] In my view, in reviewing the purpose of the IDEL Regulation the court can consider not only the wording of the regulation itself but also extrinsic evidence such as the Ministry Guide.

[48] The entitlement of the court to consider such extrinsic evidence in interpreting subordinate legislation was made clear by the decision of the Alberta Court of Appeal in *Heppner v. Alberta (Ministry of Environment)* [1977] A.J. No. 523 (Alta C.A.). Lieberman, J.A., writing for the panel stated as follows at para. 34:

> One further aspect involved in reviewing the purpose of subordinate legislation must be examined and that is what evidence a court can consider in coming to its decision. Is a court restricted to the order in council itself, or can "extrinsic" evidence be examined? This question was considered by the Ontario Court of Appeal in *LaRush v. Metropolitan Toronto & Region Conservation Authority*, [1968] 1 O.R. 300, 66 D.L.R. (2d) 310. In that case the court was examining the purpose which caused the Authority to expropriate a certain parcel of land, and it was argued by counsel for the Authority that certain documents and the testimony of officers of the Authority could not be considered in

determining the purpose behind the expropriation. Aylesworth J.A., in delivering the unanimous judgment of the court, said at pp. 316-17:

> Appellant, as I understand it, contends that none of these documents with the single exception of the appellant's resolution to submit the scheme to the Minister may be looked at and that the evidence of Mr. Higgs called as a witness at the trial by appellant cannot be looked at to ascertain the purpose of the acquisition of respondent's lands. The learned trial Judge thought he could consider these matters and I emphatically agree. The documents themselves are the appellant's own records of appellant's proceedings and of the action taken by it. The contents of these documents and anything which necessarily follows from a consideration of their contents bears in the most direct way upon the question of appellant's real purpose. Again that real purpose properly may be tested in the light of the evidence of Mr. Higgs as to the need or the lack of it to acquire respondent's lands for any purpose of conservation of natural resources; Mr. Higgs was well qualified to speak on matters of conservation and more particularly on such matters as affecting respondent's lands and the surrounding area; he was appellant's own witness. The admissibility of the documents and of the evidence of Mr. Higgs seems so clear as not to require authority.

The learned justice of appeal then goes on to cite numerous cases as authority for the proposition he has stated.

[49] Although it is not binding on the court, the Ministry Guide is of assistance by offering insight into the Ministry's intention in promulgating the provisions of the IDEL Regulation respecting constructive dismissal, including the stipulation that they do not affect an employee's common law right to advance a civil claim of constructive dismissal, a position which is consistent with s. 8(1) of the ESA.

[50] It is well-established that "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"

as stated in *Elsegood v. Cambridge Spring Service 2002 Ltd.,* 2011 ONCA O.J. No. 6095 (C.A.) at para. 14.

[51] Ms. Allen for Ocular submits that Coutinho's placement on temporary layoff on May 29, 2020 did not constitute a constructive dismissal because she did not make inquiries of Ocular as to when she might be called back to work prior to commencing the action on June 1, 2020, just two business days following Mr. Reinstra's letter giving notice of the layoff.

[52] I am unable to accept this submission.

[53] The Court of Appeal in *McGuinty v. 1845035 Ontario Inc.,* 2020 ONCA 816 (C.A.) confirmed at para. 24 that when an employee has been constructively dismissed

> the employee has an election to make — whether to continue to work, and so accept the single breach/course of conduct, or to treat that breach/conduct as bringing the contract to an end and sue for constructive dismissal. A claim that the employee has condoned a breach or course of conduct is a defence to a claim of constructive dismissal and the burden is on the employer to establish it.

[54] No authority was cited by Ocular for the proposition that, following a unilateral imposition of a layoff by the employer, an employee is under an obligation to make inquiries of the employer as to when she/he may be called back to work as a precondition to bringing an action for constructive dismissal.

[55] In my view Coutinho was entitled to treat Ocular's unilateral imposition of the layoff as bringing the contract of employment to an end and had the immediate right to sue for constructive dismissal.

[56] In my view the written notice by Ocular on May 29, 2020 to Coutinho that she was being laid off without pay constituted a constructive dismissal and Coutinho was not barred by the IDEL Regulation from bringing an action against Ocular at common law as a result.

[57] As noted above, the final basis of Ocular's motion for summary judgment is the allegation that Coutinho has fully mitigated any damages that she may have incurred upon her re-employment by Tri-City Eye on July 22, 2020.

[58] This submission can be readily addressed.

[59] Coutinho has acknowledged that she fully mitigated her common law damages by commencing employment with Tri-City Eye on July 22, 2020. However, she states that Ocular failed to comply with its duty under the ESA to pay her six weeks' salary as termination pay commensurate with her six years of service. Based upon her annual salary of $52,900, Coutinho's termination pay entitlement comprised $6,103.85.

[60] In the case of *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (C.A.) Gillese, J.A., writing for the panel, stated at para. 111:

> Statutory entitlements are not damages. Ms. Brake was entitled to receive her statutory entitlements even if she secured a new full-time job the day after the Appellant terminated her employment. Therefore, the income that Ms. Brake earned during her statutory entitlement period is not subject to deduction as "mitigation income". In reaching this view, I adopt the reasons of the Divisional Court in *Boland v. APV Canada Inc.* (2005), 250 D.L.R. (4th) 376 (Ont. Div. Ct.).

[61] Thus, although Coutinho fully mitigated her damages, she maintains her statutory entitlement to termination pay in the sum of $6,103.85 arising from the constructive dismissal.

[62] I find that there are no genuine issues requiring a trial respecting Ocular's defences that Coutinho's claim is barred by the IDEL Regulation and that she fully mitigated her loss.

Should summary judgment be granted in favour of the plaintiff?

[63] Sub-rule 20.02(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[64] Sub-rule 20.04(4) provides that where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.

[65] It is noted that Coutinho did not bring a cross-motion for summary judgment.

[66] In the case of *Landrie v. Congregation of the Most Holy Redeemer*, 2004 PNSC 4008 Perell, J. held at paras. 50-51 that on a motion for summary judgment it is open to the court to dismiss the motion brought by the moving party and grant summary judgment to the responding party when it can decide the issue that is the subject matter of the motion for summary judgment, applying the principles of proportionality and sensible management of the court process.

[67] I find that there is no basis to either of Ocular's defences relying on the IDEL Regulation and on a failure to mitigate.

[68] The only remaining defences in Ocular's pleading are that:

(a) Coutinho was dismissed for cause based upon an allegations that she (i) provided falsified information in response to Reinstra's request on May 1, 2020 that she submit records of employee's hours for the previous two weeks; (ii) disclosed confidential and proprietary information to others, including the Cambridge Doctors; and (iii) became employed directly by the Cambridge Doctors while being employed by Ocular.

(b) Coutinho unilaterally terminated her employment and was deemed to have resigned.

[69] Based upon my finding that Coutinho was constructively dismissed, I find that there is no genuine issue requiring a trial in reference to Ocular's defence that she unilaterally terminated her employment.

[70] Coutinho addressed the allegation of cause respecting the falsification of information at paragraphs 50 to 57 of her Amended Affidavit responding to the motion for summary judgment.

[71] Although Ocular had the opportunity to address the issue of cause in reply, it chose not to do so. Weinstein deposed in his Reply Affidavit at para 32 as follows:

> "I am not providing a response to the comments made by Coutinho at paragraphs 50 to 57 of the Coutinho Affidavit as they bear no relevance to the matters in issue in the Summary Judgment motion."

[72] In my view the issue of whether Ocular had cause to dismiss Coutinho for alleged falsification of records, for disclosing confidential information, or for becoming employed by the Cambridge Doctors was not the subject matter of the motion for summary judgment. *Landrie v. Congregation* does not therefore support the granting of summary judgment to Coutinho in the absence of a cross-motion for summary judgment. I find that the summary judgment motion process does not provide the court with the evidence required to fairly and justly adjudicate the dispute respecting the issue of cause.

Disposition of the defendant's motion for summary judgment

[73] For the reasons set forth above, the defendant's motion for summary judgment is dismissed.

Directions and Terms for Trial

[74] Sub-rule 20.05(1) provides that where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. Subsection (2) provides that the court may give such directions or impose such terms as are just.

[75] During submissions Mr. Konduros for Coutinho withdrew her claims for punitive or aggravated damages. Her remaining claim is relatively modest, consisting of a claim of statutory entitlement to termination pay in the sum of $6,103.85.

[76] I find that the following material facts are not in dispute:

(a) Ocular constructively dismissed Coutinho on May 29, 2020 by its letter of that date unilaterally imposing a layoff from her employment without pay;

(b) Coutinho did not voluntarily terminate her employment with Ocular; and

(c) Coutinho's statutory entitlement to termination pay, subject to determination of Ocular's defence of cause for termination, is the sum of $6,103.85, plus pre-judgment interest.

[77] The following are the sole issues for trial:

(a) Did Ocular have cause to dismiss Coutinho for allegedly falsifying records in reporting staff hours in response to the request of Mark Reinstra on May 1, 2020, disclosing confidential information of Ocular to others and/or becoming employed directly by the Cambridge Doctors while she was employed by Ocular?

(b) if so, was Ocular thereby relieved of the obligation to pay Coutinho termination pay pursuant to Part XV of the *Employment Standards Act, 2000*?

[78] The following directions are given, and the following terms are imposed, with respect to the trial of the action:

(a) each party shall deliver, within 30 days hereof, an Affidavit of Documents limited to documents which are relevant to or bear on the issues specified above, together with copies of the documents referred to in Schedule A of their respective Affidavit of Documents;

(b) there shall be no further interlocutory motions, without leave, with the exception of a motion to transfer the action to the Small Claims Court;

(c) there shall be no oral discovery;

(d) the action shall be set down for trial by the plaintiff within 60 days hereof by serving a notice of readiness for pre-trial conference on the defendant and forthwith filing the notice with proof of service;

(e) the trial shall be conducted as a summary trial under rule 76.12 of the *Rules of Civil Procedure:*

(f) each of the parties shall deliver a concise statement of his or her opening statement 10 days prior to the date set for trial;

(g) the length of the trial shall not exceed two days without leave of the trial judge, and in no event shall it exceed five days.

[79] Although the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 directed at para. 78 that where motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

[80] In order to avoid unnecessary delay in scheduling the trial, I decline to seize myself of the trial, however the conduct of the trial may be assigned to me by the Trial Coordinator is possible unless it would result in the matter not being reached for trial on a timely basis.

Costs

[81] The parties are strongly urged to settle the issue of the costs of the motion.

[82] If the parties are unable to do so, the plaintiff may make written submissions as to the costs of the motion within 14 days of the release of this Endorsement. The defendant has 10 days after receipt of the plaintiff's submissions to respond. The written submissions shall not exceed three (3) double-spaced pages exclusive of Bills of Costs or Costs Outlines, offers to settle and authorities. All such written submissions are to be forwarded to me via email to the Trial Coordinator at Brantford, at the same email address as was utilized for the release of this Endorsement.

If the parties are able to settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

D.A. Broad

Date: April 27, 2021