**CITATION:** Fogelman v. IFG, 2021 ONSC 4042
**COURT FILE NO.:** CV-20-00640029
**DATE:** 20210602

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | | |
| Gary Fogelman<br><br>Plaintiff | ) | *Allan M. Kaufman*, for the Plaintiff |
| **– and –** | ) | |
| IFG – International Financial Group Ltd.<br><br>Defendant | ) | *Stephen Bernofsky*, for the Defendant |
| | ) | **HEARD: January 28, 2021** |

**VELLA J.**

[1] This is a motion for summary judgment arising from a constructive dismissal action.

**Overview**

[2] IFG is in the business of job recruiting for the financial services industry. It is identified as a temporary placement agency made up of a group of accounting and finance recruiters with a focus on financial services recruiting solutions, accounting, financial, information technology, multidisciplined outsourced solutions, and executive search.

[3] Mr. Fogelman was employed by IFG as Managing Director of Recruiting from July 13, 2009, until he was placed on "temporary lay-off" on March 16, 2020, as a consequence of the downturn in its business resulting from the novel coronavirus ("COVID-19") pandemic.

[4] For the period from July 13, 2009, until December 4, 2014, Mr. Fogelman was paid through his corporation, 2228535 Ontario Inc.

[5] On December 4, 2014, IFG asked Mr. Fogelman to enter into an employment contract, and Mr. Fogelman obliged. On the same date, Mr. Fogelman also signed a Confidentiality, Non-Solicitation & Non-Service Agreement as requested by IFG.

[6] Mr. Fogelman was one of the several employees who were laid off at the same time by IFG as a result of the COVID-19 pandemic.

[7] As at the date of his lay-off, Mr. Fogelman was earning a base salary of $85,000 a year, together with an annual commission.

[8] Upon being laid off, Mr. Fogelman retained counsel who immediately advised that Mr. Fogelman was treating the lay-off as a constructive dismissal.

[9] Since his lay-off, Mr. Fogelman has received no notice or severance pay from IFG.

**Issues**

[10] The issues to be determined on this motion are:

(a) Is summary judgment an appropriate procedure for determining this matter?

(b) Was Mr. Fogelman an employee for the entire period of his employment?

(c) Was Mr. Fogelman constructively dismissed when he was temporarily laid off?

(d) Is the employment contract Mr. Fogelman signed enforceable?

(e) If so, is the termination clause contained in the employment contract enforceable?

(f) What damages is Mr. Fogelman entitled to?

(g) Did Mr. Fogelman mitigate his damages?

(h) Are aggravated/moral and/or punitive damages warranted?

**Analysis**

[11] A preliminary issue was raised by Mr. Fogelman with respect to the statement of defence filed by IFG. In its statement of defence, IFG specifically plead that Mr. Fogelman was an employee from 2009 and denied the existence of an employment contract as between it and Mr. Fogelman. Furthermore, in the initial affidavit of Mr. Currie filed on behalf of IFG, Mr. Currie also swears that Mr. Fogelman was an employee from 2009 and that there was no employment contract. However, in Mr. Currie's supplementary affidavit, he corrects his prior statement and states that an employment contract was entered into, and that Mr. Fogelman was an independent contractor up until that point. He attaches the employment contract as an exhibit to his supplementary affidavit.

[12] While IFG ought to have amended its statement of defence to plead the employment contract and its termination clause, as well as its position that Mr. Fogelman was initially an independent contractor, these issues were fully canvassed in the respective facta and through fulsome submissions at the hearing. Indeed, the employment contract and the enforceability of the

termination clause, together with Mr. Fogelman's employment status, were the primary focus of the arguments.

[13] Accordingly, I will address these issues, notwithstanding this pleading deficiency.

***(a) Is summary judgment an appropriate procedure for determining this matter?***

[14] Both parties submit that summary judgment is an appropriate procedure for me to assess whether or not there is a genuine issue for trial.

[15] I have concluded, applying the principles of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, that based on the record filed, there is sufficient evidence to fairly and justly adjudicate this dispute, and that a summary judgment motion is a timely, affordable, and proportionate procedure.

[16] In *English v. Manulife Financial Corporation*, 2019 ONCA 612, at para. 30, the Court of Appeal concluded that a straightforward claim for wrongful dismissal without cause is the type of case usually amenable to a summary judgment motion. While this case is not necessarily straightforward, it does turn a great deal on the interpretation and enforceability of the employment contract at issue. This can be done without the need to resort to extrinsic evidence. Furthermore, the material facts are largely undisputed. These facts allow me to determine whether Mr. Fogelman was an independent contractor and whether Mr. Fogelman was constructively dismissed. The damages, including an assessment of the applicability of aggravated/moral or punitive damages, are also the subject of largely uncontested facts.

***(b) Was Mr. Fogelman an employee for the entire period of his employment?***

[17] IFG takes the position that because Mr. Fogelman's remuneration flowed to his personal corporation for the first approximately 5 years and 5 months of his employment, Mr. Fogelman was an independent contractor for that period of time. IFG offers no other evidence to support its position other than the fact of this remuneration arrangement.

[18] The uncontested evidence is that Mr. Fogelman's job did not significantly change (if it did at all) when he signed the employment contract.

[19] More specifically, when Mr. Fogelman was initially hired by IFG, his employment was structured as follows, according to the uncontested evidence:

a) He worked full-time hours, five days a week, as a recruiter for IFG from inside the IFG office originally located at 25 King St. West, Suite 2505, Toronto, Ontario, commencing in 2009. In 2012, he moved with IFG to their office at Scotia Plaza;

b) At all times he was under the complete direction and control of IFG as Managing Director of Recruiting;

c) He had his own desk inside IFG's offices, which he used on a full-time basis, five days a week;

d) All of his income was derived from working for IFG since 2009;

e) He had no other employer since 2009;

f) IFG paid him vacation pay, as if he was an employee, from 2009;

g) IFG provided him with medical coverage benefits, as if he was an employee, since 2009;

h) IFG provided him with the essential tools of his work: a computer and a cell phone;

i) He did not have an opportunity to share in the profits of IFG, except through an employee bonus plan.

[20] None of these indicia of an employer-employee relationship changed as a result of Mr. Fogelman's signing of the employment contract.

[21] In addition, at IFG's Christmas dinner held for employees in December 2019, Mr. Fogelman was honoured with a ten-year employee recognition award and provided with $10,000, reflecting $1,000 for each year of employment. This recognition coincides with Mr. Fogelman's period of employment from July 13, 2009, to July 13, 2019. This award was given to all employees who reached their ten-year anniversary with IFG.

[22] In his affidavit, Mr. Fogelman deposed that IFG requested that he enter into an employment contract because it told him that the Canada Revenue Agency was "cracking down on independent contractors who were in essence full time employees of the company". IFG did not adduce evidence to challenge this explanation. Indeed, IFG offered no explanation for why it asked Mr. Fogelman to sign the employment contract.

[23] I reject IFG's position. Mr. Fogelman was an employee from the outset of his employment in 2009, as will be explained.

[24] Whether receiving pay through a personal corporation can transform the worker into an independent contractor was dealt with by the Court of Appeal in *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464, 292 D.L.R. (4th) 172, at para. 30:

> La-Z-Boy's submission that its relationship was with Sales Inc. alone can be answered shortly. Where an individual is providing services pursuant to an agreement, the fact that the individual is paid through his or her corporation is not determinative of whether an employment relationship exists with the individual. See *Kordish v. Innotech Multimedia Corp.* (1998), 46 C.C.E.L. (2d) 318 (Ont. Ct. J. (Gen. Div.)), aff'd [2000] O.J. No. 2557 (C.A.). On the record, there is no other conclusion available but that La-Z-Boy used the Agreements to secure the personal services of Mr. Braiden, as sales agent, even though the Agreements in the later years of the relationship were with Mr. Braiden's corporation.

[25] Notably in *Braiden*, the situation was the reverse of what we have in the present matter. In *Braiden*, the employer (appellant) admitted that the worker (respondent) was an employee at the beginning of his tenure. However, partway through his tenure, the worker was required by La-Z-Boy to sign a contract in which he was described as an independent contractor and was required to incorporate a business through which he would receive remuneration from La-Z-Boy. However, for all intents and purposes, the worker's job did not change in any material respect after he signed the new contract.

[26] In *Braiden*, the Court of Appeal held that the worker was an employee, notwithstanding the fact that he was paid through his personal corporation and described as an independent contractor by the employer, because the worker satisfied the indicia of an employee. In so concluding, the Court of Appeal undertook a purposive analysis of the relationship between the worker and the employer.

[27] In the case at bar, the evidence is consistent in demonstrating that there were no material changes to Mr. Fogelman's employment as a result of having his pay flow directly to him, after the signing of the employment contract, rather than to his personal corporation. The evidence also demonstrates that Mr. Fogelman agreed to this payment change at the request of IFG in response to IFG's Canada Revenue Agency concerns.

[28] Major J., in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paras. 47-48, set out the contextualized approach to determining whether a worker is an employee or independent contractor:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[29] Based on the evidence before me, to use Major J.'s characterization, Mr. Fogelman was performing services for IFG in the service of IFG, and not "as a person in business on his own account".

[30] Mr. Fogelman satisfied the key indicia of being an employee, as opposed to an independent contractor, on the facts of this case.

### *(c) Was Mr. Fogelman constructively dismissed when he was temporarily laid off?*

[31] IFG's position is that it was entitled to lay-off Mr. Fogelman pursuant to s. 56(2) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"). That subsection relates to an employer's ability to temporarily lay-off an employee without having that lay-off defined as a termination within the meaning of the ESA.

[32] The issue therefore becomes whether IFG had the right to rely on s. 56(2) of the ESA to avoid the common law action of constructive dismissal.

[33] Mr. Fogelman was not a member of a union.

[34] Furthermore, IFG continued to operate at the time of Mr. Fogelman's lay-off during the pandemic, albeit at a reduced capacity, since IFG's business was deemed by the Province of Ontario to be an essential service.

[35] It is uncontested that Mr. Fogelman did not acquiesce or accept IFG's decision to lay him off nor did he elect to rely upon his lay-off rights under the ESA.

[36] A review of the employment contract makes it clear that there was no provision in it that permitted IFG to lay Mr. Fogelman off.

[37] In *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831, 109 O.R. (3d) 143, at para. 14, the Court of Appeal held that "[a]t common law, an employer has no right to lay-off an employee. 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." See also, *Gent v. Strone Inc*., 2019 ONSC 155, at paras. 29-30.

[38] Furthermore, *Elsegood*, at para. 21, confirms that constructive dismissal takes effect the first day of the lay-off.

[39] In *McLean v. The Raywal Limited Partnership*, 2011 ONSC 7330, at para. 19, the court similarly found that an employer, who claimed to have temporarily laid off the employee with an intent to hire him back, was nonetheless liable for constructive dismissal. This was because the statutory concept of lay-off has no basis in the common law. If the employer carved out the right to lay-off an employee in an employment contract, then the employer could rely on that contractual provision to defeat a claim based in constructive dismissal.

[40] Similarly, in *Bevilacqua v. Gracious Living Corporation*, 2016 ONSC 4127, an employer purported to lay-off an employee because of the company's financial difficulties. The employee's claim based in constructive dismissal was upheld. At para. 18, the court held that "[t]he *Employment Standards Act* does not, as Gracious Living might have believed, authorize a layoff in the absence of a contractual provision to that effect."

[41] In *Bevilacqua* the court also stated at para. 9:

> An employer has no right to impose a layoff either by statute or common law, unless that right is specifically agreed upon in the contract of employment. The fact that a layoff may be conducted in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41, is irrelevant to the question of whether it is a constructive dismissal.

[42] I conclude that IFG did not have the contractual right to lay-off Mr. Fogelman. Furthermore, the lay-off provisions of the ESA are not available to IFG because Mr. Fogelman was a non-union employee and is not asserting his rights under the ESA to seek pay in lieu of notice or severance pay. Rather, as was made explicit by his lawyer in a letter to IFG's lawyer shortly after the lay-off occurred, Mr. Fogelman is relying on his civil remedies at common law for constructive dismissal.

[43] Assuming the employment contract is enforceable, it contained no provision permitting lay-off and therefore Mr. Fogelman was entitled to treat the lay-off as a constructive dismissal. In the event the employment contract is not enforceable, and void, IFG is in no better position since there is no suggestion in the evidence that a right to lay-off Mr. Fogelman was ever raised in their pre-existing employment relationship.

[44] I was asked to consider the potential applicability of O. Reg. 228/20: Infectious Disease Emergency Leave. However, IFG did not seriously pursue this line of argument. Nonetheless, I will address it given the fact we are still in the pandemic and O. Reg. 228/20 is still in effect.

[45] O. Reg. 228/20 was enacted by the Ontario government as a measure to provide temporary relief to employers from paying statutory notice and severance under the ESA during the course of the COVID-19 pandemic by providing that, for purposes of the ESA, temporary lay-offs would not constitute constructive dismissal (subject to stated exceptions) within the meaning of that statute. Section 7 of O. Reg. 228/20 states:

> 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.

[46] Subsection 56(1)(b) of the ESA states:

> 56 (1) An employer terminates the employment of an employee for purposes of section 54 if,
>
> > (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period;

[47] Furthermore, the Ontario Ministry of Labour bulletin entitled "COVID-19: temporary changes to ESA rules" states: "These rules do not address what constitutes a constructive dismissal at common law."

[48] The ESA provides the answer to this issue under s. 8(1):

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

[49] In other words, s. 8(1) provides that the ESA does not supercede the civil remedies otherwise available to an employee at common law or in equity.

[50] As Mr. Fogelman was not pursuing his rights under the ESA but rather was pursing his civil remedies, O. Reg. 228/20 does not apply to Mr. Fogelman's claims made under the common law pursuant to s. 8(1) of the ESA.

[51] In the alternative, if I am in error regarding my conclusion, then, Mr. Fogelman was not captured by s. 7(1) of O. Reg. 228/20 because he was constructively dismissed within the meaning of s. 56(1)(b) of the ESA. Mr. Fogelman effectively resigned within a reasonable time thereafter (within days), and the constructive dismissal and Mr. Fogelman's response occurred before May 29, 2020. Therefore, pursuant to s. 7(2) of O. Reg. 228/20, s. 7(1) did not apply to Mr. Fogelman's termination by IFG.

***(d) Is the employment contract enforceable?***

[52] According to the unchallenged supplementary affidavit of Mr. Fogelman, he played no role in drafting or amending the wording of any part of the employment contract. It was entirely drafted by IFG or its lawyers. Therefore, if there is ambiguity, the doctrine of *contra proferentum* applies and the reasonable interpretation that favours Mr. Fogelman must prevail over that which favours IFG.

[53] Further, there is no suggestion in the evidence that Mr. Fogelman received any new consideration for entering into an employment contract which, if valid, purports to reduce Mr. Fogelman's entitlement to notice at common law to the statutory minimum notice and severance entitlements prescribed by the ESA.

[54] The Court of Appeal, in *Braiden*, at paras. 46-50, reviewed the well-established law setting out that an employment contract imposed on an employee, part way through their tenure, is invalid

and unenforceable unless the employee receives new consideration. New consideration means something of benefit or value to the employee besides the mere continuation of employment. New consideration may be satisfied if the employee receives a tangible promise of security of employment, but no such promise was made to Mr. Fogelman.

[55] In *Braiden*, the Court of Appeal, at para. 49, addressed the rationale of requiring new consideration where terms of an employment contract are unilaterally changed by the employer:

> The requirement of consideration to support a change to the terms of an agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment but once they have been hired and are dependent on the remuneration of the job, they become more vulnerable.

[56] The Court of Appeal also affirmed, at para. 57, that a change in the notice provision to the detriment of the employee is a material change requiring new consideration to flow to the employee in exchange for this modification to their employment relationship:

> [In *Hobbs v. TDI Canada Ltd*. (2004), 246 D.L.R. (4th) 43 (C.A.)], Juriansz J.A., writing on behalf of the court, held that the trial judge erred. He held that the Solicitor's Agreement was an amendment of the original employment contract and that Mr. Hobbs received no consideration for it. In reaching this conclusion, Juriansz J.A. reviewed a number of decisions of this court, all of which are to the same effect: a change in the notice period is a significant modification of the employment agreement, additional consideration is required to support such a modification and continued employment does not constitute something of value flowing to the employee.

[57] As a result, the Court of Appeal held that the notice provision contained in the new employment contract between Mr. Braiden and La-Z-Boy was unenforceable, due to a lack of consideration flowing to Mr. Braiden. Therefore, Mr. Braiden was entitled to reasonable notice of termination by reason of wrongful dismissal.

[58] Similarly, in *McLean*, at para. 23, the court adopted the following passage from *Techform Products v. Wolda* (2001), 56 O.R. (3d) 1 (C.A.), at para. 24:

> It is also consistent with the principle fundamental to consideration in the context of an employment contract amendment – that in return for the new promise received by the employer something must pass to the employee, beyond that to which the employee is entitled under the original contract. Continued employment represents nothing more of value flowing to the employee than under the original contract.

[59] I find, on the evidence, that IFG merely continued Mr. Fogelman on the same terms of employment that he had immediately before signing the employment contract. The major change

to Mr. Fogelman's employment was the unilateral reduction in his notice and severance entitlements receivable upon termination of his employment.

[60] In oral submissions, IFG suggested that Mr. Fogelman's pay structure changed from a pure commission to base salary plus commission. However, there is no evidence to support this submission, including whether the alleged change in pay structure actually benefitted Mr. Fogelman. Therefore, I reject this submission.

[61] As no new consideration flowed to Mr. Fogelman in exchange for the reduction in his reasonable notice period under the common law that he had prior to the execution of the employment contract, the employment contract is null and void. The conclusion is further strengthened by the fact that Mr. Fogelman was also required to sign a non-solicitation agreement again for no new consideration.

[62] Accordingly, Mr. Fogelman is entitled to damages at common law arising from constructive dismissal.

***(e) Is the termination clause in the employment contract enforceable?***

[63] My finding that the employment contract is null and void precludes the need for me to rule on the enforceability of the termination clause contained within it. However, as much of the argument focused on this clause, I will provide my analysis of the termination clause.

[64] Mr. Fogelman says that the clause is ambiguous on its face, and under the interpretation he has advanced, the termination clause is null and void as it purports to provide him with notice and severance that is below what is required by the ESA.

[65] IFG says that it would be a strain to find ambiguity in this clause, and the plain and clear reading of that clause is that it does not run counter to the minimum requirements owed to Mr. Fogelman under the ESA.

[66] The termination clause reads, in material part:

> 3.1 The parties may terminate this Agreement as follows:
>
> (c) If termination occurs after the Probationary Period:
>
> > (i) At any time by the Employer, without cause, upon giving the Employee two (2) weeks' notice **or** notice and severance pay, if applicable, in accordance with the provisions of the *Ontario Employment Standards Act*, as amended, or any successor legislation, **whichever is greater**. The Employer will continue the Employee's benefits, if any, as required by the provisions of the *Ontario Employment Standards Act*, as amended or any successor legislation. The notice, severance, if applicable and benefit continuation referred to in this paragraph is in the full and final satisfaction of all rights and claims which the Employee may have as a result of the

> termination of the Employee's employment including statutory and common law claims. [Emphasis added.]

[67] If the clause is enforceable (and again, assuming that the contact as a whole had been enforceable), then it would foreclose Mr. Fogelman's claim for damages under the common law.

[68] Much of the argument focused on the interpretation of "or" and "whichever is greater". On IFG's interpretation, these two phrases save the subphrase before "or" that states "two (2) weeks' notice" because Mr. Fogelman is entitled to the greater of two weeks' notice or notice and severance pay in accordance with the ESA. IFG concedes that Mr. Fogelman is entitled to both notice and severance pay under the ESA (if the court finds he was constructively dismissed) which amounts, it asserted, to five weeks termination pay, five and a half weeks of severance pay, and the accrued vacation pay on each of the termination and severance amounts.

[69] According to Mr. Fogelman, the phrase restricting his right to claim only two weeks' notice creates an ambiguity as to what he is entitled and is well below what he is entitled to under the ESA. Therefore, as he is entitled to the interpretation most favourable to him, his interpretation must prevail and the termination clause is unenforceable, rendering the entire employment contract null and void.

[70] Both parties presented case law on the interpretation of termination clauses in employment contracts, and the circumstances under which the "failsafe" provision within a termination clause will salvage it. A failsafe provision is one that makes it clear that if the specific terms of the termination clause fall below the minimum statutory requirements, the statute will prevail over the offending contractual term.

[71] None of the cases presented the exact language of the termination clause that I must interpret, though they provide guidelines on how the court should approach these clauses.

[72] IFG relies primarily on the Court of Appeal's decision in *Amberber v. IBM Canada Ltd*., 2018 ONCA 571, 424 D.L.R. (4th) 169, and cases that it says are consistent with the analysis in *Amberber*, to support its position that the termination clause is unambiguous and enforceable on its face. The termination clause under consideration, and upheld as enforceable, in *Amberber*, at para. 6, stated that:

> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard

> legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

[73] On the other hand, Mr. Fogelman chiefly relies upon the Court of Appeal's decision in *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679, 437 D.L.R. (4th) 546, and cases that he says are consistent in conclusion and analysis with this decision. In *Andros*, at para. 5, the following termination clause under review was declared unenforceable:

> 4. Term of Employment
>
> …
>
> The company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director's entitlement pursuant to the Ontario *Employment Standards Act* or, at the Company's sole discretion, either of the following:
>
> > a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.
> >
> > b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary. [Emphasis in original.]

[74] The Court of Appeal upheld the motion judge's ruling that the above clause was ambiguous and, on the interpretation most favourable to the employee, was unenforceable because clause 4(a) did not provide for severance and clause 4(b) did not provide for benefits or severance. Therefore, the minimum standards under the ESA had been contracted out of and the entire termination clause was unenforceable.

[75] In *Andros*, the Court of Appeal agreed that ambiguity was created by the words which followed the phrase "greater of", namely, "or, at the Company's sole discretion" the employee would receive the (non-statutory compliant) entitlements under clause 4(a) or clause 4(b).

[76] The following principles concerning the approach to interpretation of these types of termination clauses in employment contracts, drawn from *Andros* (and repeated in *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, 444 D.L.R. (4th) 131, at paras. 17-18), are as follows:

a) There is a common law presumption that an employee's dismissal without cause will only take place on reasonable notice to that employee (at para. 18);

b) That presumption is rebutted only "if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly" (emphasis added): *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at. p. 998 (at para. 18);

c) The minimum requirements prescribed by the ESA cannot be contracted out of unless the contract is for a "greater benefit" than what the ESA provides for: ESA, s. 5(2) (at para. 19);

d) If any part of the termination clause provides lesser benefits than the ESA, then the whole termination clause is null and void. It is not possible to sever the offending part of the clause (at para. 20).

e) The enforceability of a termination clause is determined by the words of the clause alone, not by an employer's conduct after termination (at para. 20);

f) The termination clause must be interpreted as a whole (at para. 22);

g) Courts must apply the doctrine of *contra proferentem* to ambiguous termination clauses in favour of the employee (where the contract has been drafted by the employer, as it usually is), but must not strain to find ambiguity where none exists (at para. 26).

[77] Mr. Fogelman urges me to interpret the first part of clause 3.1(c)(i) that states "two (2) weeks' notice" as falling below the minimum notice and severance requirements under the ESA that he was entitled to. He points to *Rossman* in support of his position.

[78] In *Rossman*, while there was some similar language in the termination clause to Mr. Fogelman's, the key phrase that rendered the clause unenforceable was that "[b]enefits shall cease 4 weeks from the written notice" of termination. This phrase was contrary to the minimum entitlements under the ESA and also appeared to run contrary to the notice and severance components of the clause. Therefore, the whole clause was void. In *Rossman*, the Court of Appeal observed that for an employment contract for an indefinite period (like Mr. Fogelman's) a termination clause must be read together with s. 57(h) of the ESA (that stipulates that employees are entitled to a notice period of eight weeks for employment of eight years or more) to determine validity. However, the termination clause in Mr. Fogelman's employment contract does not contain any such clause that would override his ESA rights.

[79] Further, in *Rossman*, the court noted that the employee had only worked two years at the time of the termination and therefore was entitled to fewer than the four weeks of benefits prescribed in the termination clause. However, the Court of Appeal found that fact to be irrelevant to the analysis. Potential violation of the ESA in the future, by operation of the termination clause, is sufficient to void the entire clause: *Rossman*, at para. 25, citing *Garreton v. Complete Innovations Inc.*, 2016 ONSC 1178 (Div. Ct.), at para. 27. The termination clause is not to be interpreted with the benefit of hindsight. The termination clause "must be read as a whole and in the context of the circumstances as they existed when the agreement was created" (emphasis in original): *Rossman*, at para. 28, citing *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 53.

[80] Accepting Mr. Fogelman's interpretation ignores the word "or" that immediately follows this allegedly offending phrase and runs contrary to the principle that the clause must be interpreted as a whole, and not as divisible parts. The word "or" is disjunctive and gives the choice of either

two weeks' notice **or** notice and severance pay (if applicable) in accordance with the provisions of the ESA **whichever is greater**. In my view, this clause sets out a clear formula that allowed the employee to know what he was entitled to, and unambiguously states that the employee will obtain either two weeks' notice (which would have been greater than the employee would be entitled to if dismissed in one year or less from the date of employment) or the notice and severance pay prescribed by the ESA "whichever is greater".

[81] If the employment contract was enforceable, I would have found that Mr. Fogelman would have only been entitled to the notice and severance pay prescribed under the ESA for the entire term of his tenure with IFG, consistent with my ruling that he was an employee from the beginning of his relationship with IFG in 2009.

### *(f) What damages is Mr. Fogelman entitled to?*

#### *i. Reasonable Notice*

[82] In light of my finding that Mr. Fogelman had been an employee since 2009, that he was constructively dismissed when he was laid off, and that the employment contract is void for lack of new consideration, I must assess Mr. Fogelman's entitlement to damages under common law.

[83] This task is rendered easier by virtue of the undisputed facts relating to Mr. Fogelman's base salary and commission amounts as at the date of lay-off.

[84] On the basis of the uncontested evidence, I find that Mr. Fogelman's commissions were an integral part of his compensation scheme and were non-discretionary in nature, in part, based on the fact that as at the date of termination he was receiving an annual commission: *Andros*, at paras. 42-43.

[85] Using the well-established factors from *Bardal v. Globe & Mail Ltd* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) as a guideline, I find the following facts as at the date of Mr. Fogelman's lay-off:

a) Mr. Fogelman had worked for IFG for a total period of 10 years and 8 months as an employee;

b) Mr. Fogelman was 48 years old at the time of his termination;

c) He held a middle management position and had responsibility for a small team;

d) His total remuneration based on the conceded two-year average was $124,635 or $2,396.83 per week, comprised of his base salary of $85,000 and a commission calculated at $39,635;

e) The availability of similar work is, to use Mr. Fogelman's words, "highly remote and unlikely". This assertion is supported by IFG's evidence of its own economic hardship resulting in a significant reduction in its workforce as a result of the COVID-19 pandemic.

[86] In its factum, IFG stated that an appropriate notice period, based on 5 years and 3 months of employment would be approximately eight months calculated on the two-year average. This translates into approximately one and a half months per year of employment.

[87] Mr. Fogelman submits that he is entitled to more than one month notice per year of employment over the course of his 10 years and 8 months with IFG.

[88] In my view, taking into account the *Bardal f*actors, the various cases forwarded by each of the parties, and the relatively similar submissions of each of the parties, Mr. Fogelman is entitled to notice in the equivalent of approximately one and a half months per year of employment. I accordingly fix his notice period at 15 months.

[89] Mr. Fogelman is also entitled to his unpaid vacation reflecting three days at $341.46 per diem (based on his combined salary and commissions) for a total of $1,024.38.

[90] Mr. Fogelman concedes that IFG added $3,000 to his health spending account in October 2020, and this satisfies any claim for benefits he may have otherwise advanced.

*ii. Canada Emergency Response Income Support Payments*

[91] Mr. Fogelman applied for, and received, the income support payment under the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8 ("CERB Act"), in the sum of $2,000 per month, for five months from April to August 2020.

[92] IFG submits that I should reduce any award I make by the sum Mr. Fogelman received under the CERB Act.

[93] The CERB Act does not offer much guidance on this topic. However, s. 12(1) does impose a repayment obligation on recipients of the income support payment should it be determined that the recipient should not have received it, or was overpaid:

> **Return of erroneous payment or overpayment**
>
> 12 (1) If the Minister determines that a person has received an income support payment to which the person is not entitled, or an amount in excess of the amount of such a payment to which the person is entitled, the person must repay the amount of the payment or the excess amount, as the case may be, as soon as is feasible.

[94] I have reviewed the legislation, and the decision of S.F. Dunphy J. rendered in *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, at paras. 20-21. I agree with Dunphy J. that the CERB Act payments should not be treated as income for purposes of mitigation.

[95] Accordingly, I decline to deduct the CERB Act income support payments received by Mr. Fogelman from the damages awarded.

***(g) Did Mr. Fogelman mitigate his damages?***

[96] At the motion, IFG did not pursue the duty to mitigate.

[97] However, Mr. Fogelman mitigated his damages by earning $3,600 during the notice period and this must be deducted.

***(h) Is an award of aggravated/moral and/or punitive damages warranted?***

[98] As observed by MacPherson J.A. in *Rossman*, at paras. 21-22, "work is a vital aspect of the human condition", and "employees are most vulnerable at the moment of termination" and in the most need of protection at that point in time.

[99] At the motion, Mr. Fogelman's lawyer urged me to make an award of punitive damages and aggravated or moral damages. This submission emphasized IFG's refusal to pay anything to Mr. Fogelman, including the minimum statutory requirements under the ESA or under the employment contract IFG relied upon, following the lay-off. Mr. Fogelman's lawyer argued that these actions constituted high-handed and reprehensible conduct against a vulnerable former employee in an effort to play "hardball" with him.

[100] Aggravated or moral damages, as it is sometimes referenced in wrongful dismissal cases, are awarded to compensate employees for mental distress beyond the usual distress associated with being dismissed. These types of damages are awarded where the employer has engaged in a course of conduct during or after termination that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98.

[101] The trial judge in *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, aff'd 2019 ONCA 125, at para. 144, cited Emery J.'s list of factors from *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245, for assessing a claim for aggravated or moral damages:

> In *Galea*, Emery J. reviewed the appellate jurisprudence and summarized the factors to assess whether a wrongfully dismissed plaintiff is entitled to moral damages as follows, at para. 232:
>
> 1. Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
>
> 2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;
>
> 3. Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;

4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and

5. The grounds for moral damages must be assessed on a case by case basis.

[102] Furthermore, at para. 145 of *Ruston*, the trial judge noted that post-termination conduct can be part of an assessment for moral damages provided that the conduct is a component of the manner of the employee's dismissal.

[103] Based on the evidence, I have determined that aggravated or moral damages are not appropriate in this case. While the post-termination conduct by IFG in terms of its refusal to pay anything to Mr. Fogelman may satisfy one of the factors for aggravated damages, I am inclined to consider this factor under punitive damages in the circumstances of this case.

[104] I will now consider the request for punitive damages.

[105] In *Ruston*, the Court of Appeal affirmed the trial judge's rulings with respect to awarding, *inter alia*, both aggravated and punitive damages.

[106] To warrant the exercise of the court's discretion to award punitive damages, I must be satisfied that the conduct of IFG was so malicious and outrageous as to be deserving of a punitive sanction: *Honda*, at para. 62.

[107] In *Ruston*, at para. 16, the Court of Appeal stated that when determining the quantum of a punitive damages award, the court must be careful to avoid double compensation or double punishment. The Court of Appeal went on, at para. 18, to state that punitive damages "seek to punish and denunciate inappropriate or unfair conduct." This is distinct from the function of aggravated damages which are intended to compensate the plaintiff for harm suffered from the manner in which the misconduct was committed.

[108] In *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 149, the Supreme Court of Canada held that in breach of contract cases, like wrongful dismissal actions, in order for punitive damages to be awarded, there must be an independent actionable wrong. Furthermore, at paras. 111-26, the Supreme Court held that the quantum of the punitive damages award will be informed by many factors. These factors include the financial vulnerability of the plaintiff and the consequent abuse of power by the defendant where there is a power imbalance (as there was between Mr. Fogelman and IFG). To achieve the Supreme Court's stated objective of "retribution, deterrence and denunciation" the quantum of damages must be proportionate to the level of blameworthiness of the defendant's conduct.

[109] In *Galea*, at para. 291, Emery J. found that the employer's breach of its implied duty of good faith and fair dealing towards its employee was an independent wrong within the meaning of *Whiten* and *Honda* for the purposes of a punitive damages analysis. Further, at paras. 293-94, Emery J. found that the power imbalance between the employer and employee, the employer's indifference to the litigation process, and the employer's conduct both before and after the

termination, which was called deplorable, warranted a high punitive damages award of $500,000: see also *Gordon v. Altus*, 2015 ONSC 5663, at paras. 39-42.

[110] Price J., in *Wyllie v. Larche*, 2015 ONSC 4747, at para. 101, found that an employer's non-compliance with the *Canada Labour Code*, R.S.C., 1985, c. L-2, could support the basis of an award in punitive damages.

[111] In *Williams v. Motorola Ltd*., 1996 CanLII 8131 (Ont. Gen. Div.), affirmed 1998 CanLII 5023 (Ont. C.A.), at para. 37, Sedgwick J. found that conduct which involves a conscious disregard of the plaintiff's rights can justify an award of punitive damages so long as compensatory damages are otherwise inadequate to punish the defendant's misconduct.

[112] In *Nelson v. 977372 Ontario Inc*., 2013 CanLII 41983 (Ont. S.C. (Sm. Cl. Ct.)), at para. 172, the deputy judge found that the refusal by the employer to issue a Record of Employment and its refusal to pay the employee his vacation pay and last week's pay, contrary to the requirements of the ESA, was an independent actionable wrong constituting malicious conduct sufficient to attract punitive damages.

[113] I am concerned that IFG refused to provide Mr. Fogelman with any statutory entitlements under the ESA once it received notice that Mr. Fogelman considered the lay-off to be constructive dismissal. It is well established that an employer cannot lay-off employees absent a contractual right to do so, and that any such purported lay-off will be treated as a constructive dismissal at common law. Initially, it will be recalled, IFG took the position Mr. Fogelman had no employment contract.

[114] Even after IFG acknowledged that an employment contract existed, IFG did not pay the notice and severance requirements stipulated by the employment contract.

[115] IFG has not behaved well in its dealings with Mr. Fogelman over the termination. First, it took the position that Mr. Fogelman was an employee since 2009 and produced sworn evidence to this effect. This position was also reflected in its statement of defence.

[116] Then, later, by way of a supplementary affidavit, IFG changed its position and stated that Mr. Fogelman was actually an independent contractor for the first five plus years of his employment and produced an employment contract. IFG did not amend its statement of defence to plead the employment contract and its termination clause.

[117] IFG admits it knew that Mr. Fogelman took the position that the lay-off was a constructive dismissal almost immediately following his termination. IFG used this position as the excuse for not advising Mr. Fogelman of the prospects of his being recalled to work, notwithstanding its advice, reflected in its letter to Mr. Fogelman dated March 16, 2020, that it would provide him with an update of his lay-off status. At no point did IFG provide any such update, and at no point did it recall Mr. Fogelman back to work.

[118] Indeed, efforts by Mr. Fogelman's lawyer to initiate settlement discussions and his demands that Mr. Fogelman be paid at least his minimum entitlements under the ESA were met

with radio silence after an initial letter from IFG's lawyer saying that IFG would consider the proposal and would respond.

[119] IFG also made it difficult for Mr. Fogelman to effect service of the statement of claim, notwithstanding the pandemic. According to Mr. Fogelman's affidavit evidence, which I accept, IFG's lawyer declined to accept service, and when Mr. Fogelman contacted IFG to ask if he could come and serve the statement of claim, he was advised that IFG's personnel had been instructed not to accept service of his lawsuit. As a result, Mr. Fogelman, through a private process server, had to serve an IFG official at his place of residence. Even then, the official sent back the statement of claim by courier saying that IFG personnel were not allowed to accept service. This pattern of conduct, during the course of a pandemic, was designed to make it as difficult as possible for Mr. Fogelman to proceed with his lawsuit.

[120] It is also my view that the failure to comply with the ESA is an independent wrong that is outrageous and reprehensible behaviour deserving of punitive sanction. The purpose of the ESA is to provide employees with minimum standards, including minimum notice and severance in the case of termination without cause. Employers cannot be permitted to ignore their obligations under the ESA while awaiting the outcome of a court proceeding where the termination was conceded to be without cause. It is critical that the courts protect the statutory rights of employees, especially in harsh economic times. I agree with Mr. Fogelman's position that IFG's refusal to pay anything to Mr. Fogelman was an attempt to play hardball with him.

[121] I have considered the compensatory aspects of the damages award and determined that "there is a shortfall between the amount of that compensation and the total amount required to accomplish the objectives of retribution and deterrence and denunciation of the defendant's misconduct" to use the words of Cronk J.A. in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, at para. 228.

[122] Having reviewed the case law submitted, and recognizing that IFG's business has suffered an economic downturn in the wake of the pandemic, it is my view that an award of $25,000 is an appropriate award of punitive damages. This award proportionately meets the goals of retribution, deterrence, and denunciation of IFG's misconduct. It also sends an appropriate message to employers that the mandatory requirements imposed upon them by the ESA, in favour of employees, must be abided by promptly.

## Conclusion

[123] Based on the evidence, I find that Mr. Fogelman was constructively dismissed at common law, and that he was an employee from the outset of his employment with IFG in 2009. I also find that the employment contract signed by Mr. Fogelman is unenforceable for lack of consideration.

[124] Therefore, this motion for summary judgment is granted.

[125] Damages are assessed as follows:

(a) Pay in lieu of 15 months' notice: $155,793.75;

(b) Three unpaid vacation days: $1,024.38;

(c) Punitive damages: $25,000.

[126] From the above damages assessment will be deducted the sum of $3,600, as referenced above, to reflect Mr. Fogelman's mitigation efforts.

[127] Therefore, damages are fixed at $178,218.13.

[128] I agree with Mr. Fogelman that prejudgment interest should be fixed from the date of the termination, as he has received no sums of money from IFG and that is the day upon which his cause of action arose. Accordingly, prejudgment interest on the above amounts will run from the date of termination pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[129] Mr. Fogelman will also receive postjudgment interest pursuant to the *Courts of Justice Act*.

[130] The parties are to try to agree on the costs and are directed to exchange their respective costs outlines. If the parties cannot agree, then Mr. Fogelman shall deliver his costs outline and written submissions, not to exceed three pages double spaced, by June 18, 2021. IFG is to respond with its costs outline and responding written submissions, not to exceed three pages double spaced, by June 25, 2021.

Vella, J.

Justice S. Vella

**Released: June 2, 2021**

**CITATION:** Fogelman v. IFG, 2021 ONSC 4042
**COURT FILE NO.:** CV-20-00640029
**DATE:** 20210602

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Gary Fogelman

Plaintiff

**– and –**

IFG – International Financial Group Ltd.

Defendant

---

**REASONS FOR JUDGMENT**

---

Vella J.

**Released: June 2, 2021**