

# CHECK OUT TIME: COURT CERTIFIES CLASS ACTION FOR DISMISSAL OF HOTEL EMPLOYEES DUE TO THE PANDEMIC

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Over the past two years, there have been many unexpected changes at the workplace because of the COVID-19 pandemic, with many employers across various industries electing to implement mandatory workplace vaccinations, make unilateral changes to the job responsibilities of their employees or terminate some workers altogether. These changes have resulted in some affected employees bringing litigation against their employers.

Recently, a group of hourly employees terminated for COVID-19 related reasons proposed to bring a class action proceeding against their prior employer. While class actions are not new in British Columbia, employment related class claims have been extremely rare. In this recent example, the BC Supreme Court (the "Court") certified the claim as a class proceeding, allowing a class of former hotel employees to bring a variety of claims collectively against their employer.

## Facts

The representative plaintiff worked as a concierge at the Pan Pacific Hotel in Vancouver, BC, which is owned by the defendant, Ocean Pacific Ltd.<sup>[1]</sup> The plaintiff alleges that, amongst other things, the defendant wrongfully dismissed him and all hourly rate employees due to COVID-19 related reasons. Rather than individually bringing wrongful dismissal claims against the defendant, the plaintiff sought certification from the Court to bring a class action proceeding on behalf of all regular hourly rate employees who had previously been employed by the defendant. In their proposed class action, the employees are seeking compensation for:

- wrongful dismissal;
- breach of the duty of good faith and honest performance in contract;
- unjust enrichment concerning unpaid group Employment Standards Act termination benefits;
- punitive damages; and
- pre- and post-judgment interest.

In order to certify a class proceeding, five requirements must be met<sup>[2]</sup>:

- a. the pleadings disclose a cause of action;
- b. there is an identifiable class of 2 or more persons;
- c. the claims of the class members raise common issues;
- d. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
- e. there is a representative plaintiff who will fairly and adequately represent the issues of the class, has proposed a workable plan for the class proceeding and does not have a conflict with the other class members on the common issues.

Courts will consider the extent to which a plaintiff has met these requirements under the *Class Proceedings Act* when coming to a decision about whether a class action may be certified and allowed to proceed to trial. In this case, the defendant said that the statutory requirements under the *Class Proceedings Act* were not met. Specifically, the defendant asserted that the representative plaintiff's claims do not disclose a cause of action, the class definition is too broad, the claims do not raise a common issue, and the plaintiff is not a suitable representative plaintiff.

## **Analysis**

### *Cause of Action*

In order to satisfy the first requirement under the *Class Proceedings Act*, the Court must consider whether, assuming all facts pleaded to be true, the pleadings disclose a cause of action, unless it is plain and obvious that the claim cannot succeed.<sup>[3]</sup>

At certification applications, defendants can apply to strike the pleadings if they take the position that some or all of these requirements have not been met. In response, plaintiffs may propose to amend defective pleadings, especially when they come under scrutiny at a certification application. Although prior litigation heard in the British Columbia Court of Appeal has confirmed courts should approach requests for amendments in a "generous" way, the Court must also consider any prejudice to the defendant, the stage of the case and the opportunities the plaintiff has had to produce a viable claim.<sup>[4]</sup>

In this instance, the defendant took issue with the proposed common issues, asserting that the claims pleaded did not give rise to common claims. The representative plaintiff proposed amendments to the pleadings, which the Court stated must be done with specificity. While the Court found that the representative plaintiff was unable to fix the problems with the pleadings entirely, the amendments were appropriate and were proposed early enough that the defendants would not suffer any prejudice if the amendments were allowed.<sup>[5]</sup>

- a. Damages Arising From Breach of the Duty of Good Faith and Honest Contractual Performance

The Supreme Court of Canada has held that there is a general duty of honesty in contractual performance, which means that parties should not lie or knowingly mislead each other about matters directly related to the contract; this requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith.<sup>[6]</sup>

In this case, the representative plaintiff proposed that the question of whether the defendant intentionally and/or recklessly misled class members about their prospects for ongoing employment is a common issue.<sup>[7]</sup>

The Court agreed; in its decision, the Court reviewed evidence of identical communications sent to all class members by the defendant, which asked the class members to remain hopeful and described a journey the class members would “take together” with the defendant. At the time this correspondence was sent, the defendant had already made the decision to terminate most of the class members.<sup>[8]</sup>

The representative plaintiff also sought to include damages for mental distress that have resulted from breach of the duty of good faith and honest performance. He stated class members may have experienced hurt and betrayal at the defendant’s decision to terminate them while sending a gratitude letter that seemed inconsistent with its decision to terminate. The Court held that the reactions of class members to the termination and the communications are different; the extent to which the class members were affected by the termination is also based on individual circumstances. Accordingly, the Court held that damages for mental distress is not a common issue.<sup>[9]</sup>

Lastly, the representative plaintiff sought to amend the claim to include group termination benefits payable under section 64 of the British Columbia *Employment Standards Act*. The Court refused the amendments sought, finding that group severance benefits provided for in section 64 cannot be subject to a claim of the breach of the duty of good faith and honest performance. In coming to this decision, the Court held that the *Employment Standards Act* already provides adequate means for enforcing the benefits it confers – the legislature did not intend for such benefits to be enforced through private action.<sup>[10]</sup> Simply, a plaintiff cannot sue for breach of contract to pursue statutory employment entitlements.

#### b. Punitive Damages

The Supreme Court of Canada has held that a court may award punitive damages “in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.”<sup>[11]</sup>

In this case, the defendant asserted that the representative plaintiff had not pleaded the material facts required for punitive damages; even if the material facts were taken to be true, the conduct the representative plaintiff sought to prove could not justify an award of punitive damages. The Court disagreed, finding that the

pleadings set out the material facts relied on in support of the relief for punitive damages and that the claim is not bound to fail.<sup>[12]</sup>

#### c. Unjust Enrichment

Unjust enrichment occurs when one party has received a benefit at the expense of another party without any supporting reason or explanation based in law.

The Supreme Court of Canada has set out the legal framework for unjust enrichment claims, which requires that the plaintiff establish three elements<sup>[13]</sup>:

1. An enrichment of or benefit to the defendant;
2. A corresponding deprivation of the plaintiff; and
3. The absence of a juristic reason for the enrichment.

In respect of the claim for unjust enrichment arising from the defendant's alleged wrongful actions to avoid paying group termination benefits under section 64 of the *Employment Standards Act*, the defendant made the same arguments adopted by the court above. While the Court found that the relief was not pursuant to the *Employment Standards Act*, but instead, based on the actions of the defendant to avoid providing such benefits, the broad principles with respect to statutory benefits applied. Accordingly, the Court struck this portion of the claim, holding that the group termination benefits could not be subject of a claim for disgorgement based on unjust enrichment.<sup>[14]</sup>

#### *Identifiable Class*

In order to certify a class proceeding, the representative plaintiff must establish that there is an identifiable class of two or more persons.

In this instance, the defendant was concerned about whether the class definition included on-call or casual employees, current employees, and employees of “the Pan Pacific Hotel” or “the defendant”. In particular, the defendant took issue with the inclusion of current employees in a claim regarding constructive and wrongful dismissal. The Court agreed and held that the definition should consider those employees whose shifts were “cancelled” – meaning that the defendant stopped giving such employees regular shifts that were never recommenced. The Court also highlighted that other issues regarding the class definition were not addressed and granted the parties leave to do so later.

#### *Common Issues*

The *Class Proceedings Act* defines common issues as follows<sup>[15]</sup>:

- a. Common but not necessarily identical issues of fact, or
- b. Common but not necessarily identical issues of law that arise from common but not necessarily identical facts

The representative plaintiff sought to certify 11 common issues relating to breach of contract, breach of the duty of good faith and honest performance, punitive damages and unjust enrichment. The Court did not consider the question of common issues regarding unjust enrichment because the amended notice of civil claim did not disclose a cause of action in unjust enrichment, as discussed above.

- a. Common Issues Regarding Breach of Contract

The *Employment Standards Act* codifies the common law principle of constructive dismissal and states that if a condition of employment is substantially altered, the employee's employment may be deemed to be terminated.<sup>[16]</sup>

The defendant argued that constructive dismissal could not be decided commonly, as the change to the employment contract unilaterally imposed by the employer and the existing employment must be fundamental and rejected by conduct or assertion of the employee. The Court took a broad approach to the first question, finding that there was no need to determine if the change was fundamental on an individual basis, as the defendant did not provide evidence that the reduction in hours did not equate to each member of the proposed class having their hours "drastically reduced".<sup>[17]</sup> The second inquiry, however, requires an examination of the conduct of the class members individually and was not clear on the evidence the representative plaintiff deposed. As such, the Court held that only the first inquiry could be certified as a common issue.<sup>[18]</sup>

The Court went on to consider whether the notice entitlements increased due to a lack of alternative employment generally because of the COVID-19 pandemic or due to the defendant's communications about the prospects for ongoing employment with them. A calculation of notice requirements requires a review of the person's job, length of service, age and availability of similar employment, having regard to the experience, training and qualifications of the employee.<sup>[19]</sup> With respect to the first query, the Court found that it would be of value to consider the evidence of the impact of the pandemic on the hotel industry as a whole and certified this question as an appropriate common issue.<sup>[20]</sup> The Court, however, struck the second for lack of relevance.

- b. Common Issues Regarding Breach of the Duty of Good Faith and Honest Contractual Performance

The defendant argued that the proposed common issues relating to the allegedly misleading communications and a breach of this duty could not be determined on a class wide basis due to the individual nature of the circumstances relating to each issue. The Court disagreed and held that there was sufficient similarity to the

circumstances in the evidence and that individual communications did not disclose any information pertaining to ongoing employment that was different from what was in the common communications.<sup>[21]</sup> The Court further found that there was sufficient commonality with respect to the issue of damages for lost earnings arising from this breach. The Court relied on the decision in *Rumley v British Columbia*, 2001 SCC 69 for the proposition that the possibility of a nuanced or varied answer with respect to damages did not detract from the commonality of the issue, so long as success for one class member did not result in failure for another.

For these reasons, the Court certified the question of whether these communications were misleading, whether this conduct amounted to a breach of the duty of good faith and honest performance and whether class members were entitled to damages for lost earnings during this period.

#### c. Common Issues Regarding Punitive Damages

The defendant asserted that the amount in punitive damages to be awarded is not a common issue because individual assessments are required before an award of such damages can be made. The Court disagreed and held that a total amount of punitive damages can be awarded to class members as a whole because the *Class Proceedings Act* allows statistics to be used in order to assess damages and provides direction on how the damages may be divided amongst individual class members.<sup>[22]</sup>

In coming to this decision, the Court found that aggregate punitive damages under the *Class Proceedings Act* may be assessed as a common issue if it is found that punitive damages are warranted.

#### *Preferable Procedure*

The *Class Proceedings Act* requires that the plaintiff establish that a class proceeding is the preferable way to resolve all common issues identified in a fair and efficient way.<sup>[23]</sup> The Court must also weigh whether a class action would be the most realistic way for the issues identified to be resolved, which includes considering whether non-judicial alternatives may be available.<sup>[24]</sup>

Here, the defendant argued that the class proceeding would not be the preferable procedure because the common issues were swamped by individual issues. The Court found that while several individual issues were dependant on the answers to common issues, the answers to common issues would inform each of the individual issues. As such, they are a substantial component of the case and it would be fair and efficient to handle all claims as a class action lawsuit.<sup>[25]</sup>

The defendant also argued that individual actions are a viable alternative to a class proceeding, and that fast track and summary proceedings could provide a cost-effective and timely resolution. The Court disagreed because only two individuals out of the over 100 potential class members had commenced a claim against their former employer; this means class members do not consider bringing their own action against their

employer in the British Columbia Supreme Court is a viable alternative.<sup>[26]</sup> Accordingly, based in the principles of judicial efficiency, coupled with the goals of access to justice and class proceedings in simplifying and resolving individual issues, certification was preferable.

### *Representative Plaintiff*

In order to certify a class proceeding, the Court must consider whether there is a representative plaintiff who can meet all of the following criteria<sup>[27]</sup>:

- i. Fairly and adequately represent the interests of the class;
- ii. Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding; and
- iii. Does not have, on the common issues, an interest that is in conflict with the interests of other class members.

The defendant criticised the plan for the proceeding submitted by the representative plaintiff in this case for failing to address questions regarding discovery. But the Court found that section 17 of the *Class Proceedings Act* and the common law make it clear that describing discovery of individual class members is an exception and cannot amount to a failing in a litigation plan.<sup>[28]</sup>

The defendant also took issue with proposed timelines, and argued that the litigation plan did not address individual issues meaningfully. The Court held that proposed timelines may be addressed at a later point and took a broad approach when considering individual issues, finding that a lack of a comprehensive litigation plan is not fatal and must be considered as part of the certification application as a whole.<sup>[29]</sup> Relying on the underlying principles of access to justice and judicial efficiency, the Court found the litigation plan to be adequate despite gaps and imperfections. Though the *Class Proceedings Act* identifies five requirements to be met in order to certify a class action, a class action may still be certified if one or more of the requirements are not satisfied.<sup>[30]</sup>

Lastly, the defendant asserted that the representative plaintiff had a conflict with the class as he falls into one of the two groups and so must be in conflict with the other, but the Court found no such conflict.<sup>[31]</sup>

### **Decision**

The Court held that, subject to further submissions on the class definition, the representative plaintiff had satisfied the requirements for certification set out in section 4 of the *Class Proceedings Act* and certified the matter as a class proceeding.<sup>[32]</sup> The Court further granted leave to amend the notice of civil claim in the form of the above-mentioned amendments and struck the aforementioned matters that were not appropriate for the claim.

## Takeaways

When deciding whether to certify a class proceeding, courts undertake a holistic and integrated approach, keeping in mind access to justice and the most efficient way to use judicial resources.<sup>[33]</sup> In this case, the Court demonstrated a broad approach to allowing amendments to defective pleadings when they come under scrutiny during a certification application, allowing several amendments to the damages sought in this case. The Court leaned towards a generous approach to assessing deficient pleadings and has shown that it will favour certification even where there are gaps and imperfections in the representative plaintiff's claims.

Whether this is a one-off case or the start of a trend for addressing group terminations remains an open question. With this decision, terminated employees may start to see class actions as a more expedient and efficient way to bring a claim in a way that requires less financial resources than multiple individual claims. However, the long time frame to see a class proceeding through to trial (often more than 10 years) and lack of control for individual claimants may serve to dissuade employees from pursuing these class proceedings.

Certification of this class action comes at a time during which employers may continue to face claims for actions taken in reducing their workforce during the ongoing COVID-19 pandemic, particularly in the service and hospitality industries, which have been hit hard by the pandemic. While this matter has been certified as a class action, the merits of this claim have yet to be assessed by the Court. How the Court may resolve this matter or other similar cases that may follow will be of interest to employers and employees alike. This decision highlights the risk for employers that workplace changes or dismissals can morph into class action lawsuits, rather than individual claims, bringing greater costs and exposure to employers for claims that normally would be dealt with one by one.

[1] *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414 at para 1 [*Escobar*].

[2] *Class Proceedings Act*, RSBC 1996, c. 50, s. 4(1) [*CPA*].

[3] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 63 per Justice Rothstein citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20, *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at p. 980 and *Hollick v. Toronto (City)*, 2001 SCC 68 at para 25.

[4] *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para 44.

[5] *Escobar*, *supra* note 1 at para 18.

[6] *Bhasin v. Hrynew*, 2014 SCC 71 at para 73.

[7] *Escobar*, *supra* note 1 at para 156.

[8] *Ibid* at para 159.

[9] *Ibid* at para 169.

[10] *Ibid* at para 65.

[11] *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 SCR 1085 at para 27.



[12] *Escobar*, *supra* note 1 at para 77.

[13] *Kerr v. Baranow*, 2011 SCC 10 at para 32.

[14] *Escobar*, *supra* note 1 at para 90.

[15] *CPA*, *supra* note 2 at s. 1.

[16] *Employment Standards Act*, RSBC 1996, c 113, s. 66.

[17] *Escobar*, *supra* note 1 at para 138.

[18] *Ibid* at para 147.

[19] *Bardal v Globe & Mail Ltd.*, [1960] O.W.N. 253].

[20] *Escobar*, *supra* note 1 at para 152.

[21] *Ibid* at para 161.

[22] *CPA supra* note 2 at ss.30-33.

[23] *CPA supra* note 2 at s4(1)(d).

[24] *Escobar supra* note 1 at para 213.

[25] *Ibid* at para 223.

[26] *Ibid* at para 227.

[27] *CPA supra* note 1 at s4(1)(e).

[28] *Escobar supra* note 1 at para 237.

[29] *Ibid* at para 247.

[30] *Escobar*, *supra* note 1 at para 244.

[31] *Ibid* at para 252.

[32] *Ibid* at para 256.

[33] *Ibid* at para 247.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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