MIS(CLASS)IFIED? FIRST-OF-ITS-KIND CLASS ACTION GETS THE GREEN LIGHT

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For the first time, a group of workers who were allegedly misclassified as independent contractors have been certified to proceed with a class action lawsuit against their principal. In *Omarali v. Just Energy* ("*Omarali*"),[1] an Ontario Superior Court judge approved a class of approximately 7,000 current and former sales agents who allege, among other claims, that Just Energy breached the Employment Standards Act, 2000 (the "ESA") by failing to treat them as employees and provide them with minimum wage, overtime and other benefits provided to employees under the ESA.

Background

Just Energy provides electricity and natural gas supply to residential and commercial customers throughout Canada. A significant component of its revenue is generated by independent sales agents who work door-to-door and are paid entirely by commission.

For the purposes of the certification motion, the Court accepted the following evidence about the sales agents:

- they work up to 12 hours per day, with the morning portion dedicated to meetings (where agents "practice the sales presentation and receive coaching and suggestions from the crew coordinator") and the balance of the day dedicated to selling;
- they are driven to pre-assigned locations as a group and returned to the regional sales office at the end of the day;
- they are unable to change their pre-assigned work areas without Just Energy's permission and are reprimanded if they take time off work;
- they are given sales scripts, required to wear Just Energy-branded clothing and required to follow internal and external codes of conduct (including Just Energy's Code of Business Conduct, which expressly provides that the company "may discipline and/or terminate its relationship or affiliation with any representative who breaches this Code or related policies"); and,
- the majority of agents exclusively sell Just Energy products and are economically dependent on Just Energy as a result.

The case therefore involves the classic determination of whether a sales agent is an employee or an independent contractor. The question was whether that determination can be made through a class action.

Class Proceedings Found to Be Appropriate

Under Ontario's *Class Proceedings Act, 1992* (the "CPA"), the court is obligated to certify a proceeding as a class action where: (i) the pleadings disclose a cause of action; (ii) there is an identifiable class; (iii) the claims of the class members raise common issues of fact or law; (iv) a class proceeding would be the preferable procedure; and (v) there is a plaintiff who adequately represents the interests of the class.

In *Omarali*, the sales agents' request for certification turned primarily on the third factor required by the CPA: whether the proposed common issues can advance the litigation. The Court accepted that there was no meaningful distinction between the sales agents job functions so the inquiry was focused on whether Just Energy exercises a high degree of control over sales agents (one of the hallmarks of an employment relationship) on a class wide basis, through its policies and practices. If there is no commonality in Just Energy's practices towards the class members, certification would not be possible because there would be a need to inquire into each class member's individual circumstances.

Just Energy argued that the determination of whether sales agents are independent contractors or employees can only be made on an individualized basis. As evidence of the "wide variation" in the nature or extent of control over agents, the company pointed to the fact that every agent is required to sign an independent contractor agreement which provides that they are generally "on their own to do as they please".

However, the Court was quick to point out that the terms of a written agreement are not determinative of a worker's status. Regard must be given to the totality of the relationship between the parties and how the relationship plays out in reality. In this case, the plaintiff submitted documentation from Just Energy to as evidence of the practices set out above, as well as representations that Just Energy made to the Ontario Energy Board.

The Court held that the documentation demonstrated a high degree of control exerted by Just Energy over the "how, where and when" of the agents' behaviour. The Court concluded that the agents had met the relatively low evidentiary burden required to establish commonality and certified the sales agents as a class following a brief review of the four remaining factors set out in the CPA.

What Employers Should Know

Certification of a class action is a procedural measure that has nothing to do with the merits of the dispute. As the court noted, Just Energy could still defeat the sales agents' lawsuit on the merits of the case, whether by way of summary judgment or a common issues trial.

Nevertheless, the decision in *Omarali* is significant because, in the past, Canadian courts have refused to deal with worker misclassification cases by way of class action on the basis that individualized assessments of fact were required with respect to each individual worker. However, the Court's newfound willingness to certify a group of allegedly misclassified workers could mean that companies who engage a large number of independent contractors as part of its regular workforce might find themselves having to deal with costly and unexpected class action litigation in the not so distant future. We have seen this happen in the United States (see the California case involving Uber Technologies, Inc., which dealt with a similar issue) and now we have an Ontario case also proceeding to the next stage.

The case is also a reminder to companies that just because there is a written agreement that classifies the relationship as that of an independent contractor, a court or tribunal is going to look to how the parties behave during the course of the relationship to determine the real status of the worker. Where a company relies on policies and manuals to dictate worker behaviour, it is taking on additional risk that an adjudicator will find that the company is exerting substantial control over the worker. Misclassifying workers can lead to substantial liability for employers and should be an issue that is constantly reviewed as part of a risk assessment of the company's workforce.

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1. 2016 ONSC 4094.

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.